Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ANR PIPELINE COMPANY, *et al.*,
Petitioners,

v.

DIRECTOR OF PROPERTY VALUATION,
DEPARTMENT OF REVENUE OF THE STATE OF KANSAS,
Respondent,

Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Equal Protection Clause, as interpreted by this Court in *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336 (1989), prohibits state taxing officials from discriminating between railroads and other taxpayers, all of which are classified identically by the state legislature, by entering into side agreements with railroads to lessen their tax burden.

2. Whether the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503, preempts state law property classifications or, instead, leaves states free to follow their own taxation schemes with uniform treatment within classes, as long as they comply with the federal standard of non-discrimination against railroad property.

PARTIES TO THE PROCEEDING

The following parties participated in the proceedings below and are petitioners: ANR Pipeline Company, Colorado Interstate Gas Company, Enron Liquids Pipeline Company, MAPCO Ammonia Pipeline, Inc., MAPCO Fractionator, Inc., Mid-America Pipeline Company, and Northern Natural Gas Company.

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

The Coastal Corporation, through wholly owned intermediate subsidiaries, is the ultimate parent company of ANR Pipeline Company and Colorado Interstate Gas Company, neither of which has subsidiaries other than those wholly owned.

Enron Corp., through wholly owned intermediate subsidiaries, is the ultimate parent company of Northern Natural Gas Company, which has no subsidiaries.

Enron Liquids Pipeline Company has no parent company, though it is owned in part by Enron Corp., and has no subsidiaries other than those wholly owned.

MAPCO, Inc., through wholly owned intermediate subsidiaries, is the ultimate parent company of MAPCO Ammonia Pipeline, Inc., MAPCO Fractionator, Inc., and Mid-America Pipeline Company, none of which has subsidiaries other than those wholly owned.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners ANR Pipeline Company, Colorado Interstate Gas Company, Enron Liquids Pipeline Company, MAPCO Ammonia Pipeline, Inc., MAPCO Fractionator, Inc., Mid-America Pipeline Company, and Northern Natural Gas Company hereby petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Kansas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas is reported at 866 P.2d 1060 (Kan. 1994) and is included in the Appendix at pp. 1a-21a. The order of the Kansas Board of Tax Appeals is not reported and is included in the Appendix at pp. 22a-32a.

JURISDICTION

The decision of the Kansas Supreme Court was entered on January 21, 1994. Rehearing was denied on March 15, 1994. App. 33a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Article VI, Section 2 of the United States Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, § 2.

The Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503, is included in the Appendix at pp. 34a-35a.

Article 11, Section 1 of the Kansas Constitution as amended in 1985 is included in the Appendix at pp. 36a-38a.

STATEMENT

A. Factual Background

This Court has long recognized that natural gas is a vital resource providing millions of consumers with an inexpensive and environmentally responsible source of energy that can be found in abundant supply within the

United States.[1] It can be used for a multitude of purposes, from heating homes in the winter and fueling industry to powering combustion-turbine engines for the cogeneration of electricity. To reach consumers throughout the country, an interstate network of pipelines traverses the nation, providing an efficient, reliable, and clean method for transporting this fuel from its source of production. However, if the states through which these pipelines pass are allowed to single out pipelines by imposing higher taxes on them than on other similarly situated fuel transporters, consumers across the nation ultimately will face higher energy costs and will be deprived of the full benefits and advantages of this exceptional system of transportation for the cleanest of fossil fuels. By shifting the financial burden of taxes onto energy consumers nationwide, Kansas, through the tax scheme at issue in this case, is raising additional revenue for its own coffers.

Petitioners are six open-access common carriers that transport fuels such as natural gas or natural gas liquids in interstate commerce, and a "fractionator" which separates natural gas products for the shippers of natural gas. Railroads are open-access common carriers that also transport fuels in interstate commerce in competition with petitioners. Kansas law classifies both pipelines and railroads as "public utilities" and subjects them to precisely the same valuation and assessment for ad valorem taxes. Kan. Stat. Ann. § 79-5a01 (1989). However, for the tax years relevant to the petition, as well as before and after, the Kansas Director of Property Valuation of the Department of Revenue ("respondent") admittedly treated certain favored railroads in a grossly dissimilar way from all other public utilities—including pipelines and even other railroads.

The Kansas Constitution provides that the personal property of public utilities is to be assessed uniformly at 30% of value. Kan. Const. art. 11, § 1, 2(C), App. 37a.

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[1] *See, e.g., Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923).

The Kansas Constitution also provides that the property of pipelines and railroads together is to be assessed uniformly at 30% of value. *Id.* at 1(D), App. 37a. Petitioners' property, both real and personal, was assessed at no less than 30%. However, during these same tax years, respondent negotiated a special arrangement with certain railroads and assessed their real property below 30%. In addition, respondent exempted 80% of the railroads' personal property from taxes altogether, providing for an effective assessment rate of 6% of value (20% of property at 30% of value). However, 100% of the pipelines' personal property was taxed. Thus, under this special deal, the treatment received by the favored railroads in disregard of the state legislature's mandate was more favorable than that received by all other members of the subclass.

B. The 4-R Act

In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act (the "4-R Act"). The 4-R Act provided that if states imposed assessment ratios or tax rates on railroad property significantly higher than the ratios or rates levied on other commercial and industrial property within a state, those ratios or rates would be deemed to discriminate unreasonably against interstate commerce and their enforcement could be enjoined. See 49 U.S.C. § 11503(b) and (c), App. 34a-35a. Congress gave the states a three-year grace period within which to bring their taxation schemes into compliance. See Pub. L. No. 95-473, § 2(b), 92 Stat. 1337, 1466 (1978). Yet the Kansas legislature failed to so modify its laws. Even when it amended its constitution in 1985, Kansas classified railroads and pipelines together and required them to be taxed uniformly. Thus the Kansas legislature has concluded that, even in the wake of the 4-R Act, railroads and pipelines are similarly situated.

In 1989, several railroads brought suit in the United States district court in Kansas challenging the state's taxation scheme as discriminatory under the 4-R Act.

The action never proceeded to trial. Instead, respondent voluntarily agreed to give those railroads that had brought suit favorable tax treatment. For the 1989 tax year, respondent agreed to exempt 80% of the personal property of these railroads. *Burlington N. R.R.* v. *Rolfs*, 1989 Consent Decree, ¶¶ 14-15, 17. State law provided for no such exemptions, and none was granted to other railroads and public utilities, including petitioners. See Brief of Appellee, *In re ANR Pipeline Co.*, 866 P.2d 1060 (Kan. 1994) (No. 92-69116-AS), at 24. For the 1990 tax year, respondent once again granted those railroads challenging Kansas' tax law an 80% personal property exemption and additionally assessed their real property at only 25%. *Kansas City Terminal Ry.* v. *Rolfs*, 1990 Consent Decree, ¶¶ 14-15. For the 1991 tax year, respondent continued the same treatment, but assessed the real property of the railroads challenging Kansas' tax law at an even lower percentage, 22.3%. *Burlington N. R.R.* v. *Beshears*, 1991 Consent Decree, ¶¶ 19-20. Respondent has continued to give favorable tax treatment to select railroads in defiance of the legislative policy embodied in the Kansas Constitution and laws that railroads and pipelines should be treated identically. *Mid-Michigan R.R.* v. *Beshears*, 1992 Consent Decree, ¶¶ 19-20; *Burlington N. R.R.* v. *Parrish*, 1993 Consent Decree, ¶¶ 16-17.

C. Proceedings Below

Petitioners each brought an appeal before the Kansas Board of Tax Appeals (the "Board") from their assessments in the 1990 and 1991 tax years.[2] Since the underlying facts were not in dispute, these cases were presented to the Board—and to the Kansas Supreme Court on appeal—on stipulated facts. Petitioners argued that they were subclassified with railroads under state law, but not provided the same tax treatment afforded to the railroads

[2] Appeals from the tax treatment petitioners received in the 1989, 1992 and 1993 tax years are still pending before the courts.

by respondent. Petitioners argued that this disparate treatment violated the Equal Protection Clause of the Fourteenth Amendment, as well as the state constitution.

Although the Board acknowledged that it was "not at all convinced that the Decree [giving certain railroads favorable tax treatment] represents a valid application of the 4-R Act, nor that the result complies with the body of Kansas decisions," App. 27a, ¶ 12, the Board nevertheless denied petitioners any relief. The Board did so, however, without directly addressing petitioners' arguments.

On appeal, the Kansas Supreme Court was likewise "at a loss" to understand the basis upon which state taxing officials had conferred favorable tax treatment upon the railroads. App. 8a. No state policy justified that action. Nevertheless, the court construed the 4-R Act as having created a new state system of classification. It found that the 4-R Act had preempted the state's classification of railroads as public utilities. *Id.* at 12a, 18a-19a.

The state court admitted that the Board had not specifically addressed petitioners' equal protection argument. App. 19a. Nonetheless, without reference to any of this Court's equal protection decisions, the state court proceeded to reject the approach followed by the Nebraska Supreme Court and to endorse the poorly reasoned approach taken by an Alabama appellate court and the Supreme Court of Tennessee. Once it had found that the 4-R Act preempted state tax classifications of railroads, the court determined that the remaining members of the subclass were treated equally and that therefore there had been no violation of the Equal Protection Clause. *Id.* at 18a-19a.

REASONS FOR GRANTING THE PETITION

The decision of the Kansas Supreme Court raises two recurring and significant questions of federal law: First, whether state taxing officials are free to discriminate among taxpayers in violation of a state legislative policy that treats those taxpayers identically, without running afoul of the Equal Protection Clause of the Fourteenth Amendment. The decision below is flatly inconsistent with the holding of the Nebraska Supreme Court in a case involving precisely the same situation and the logic of the decision below squarely conflicts with the holding of this Court in *Allegheny Pittsburgh Coal Co.* v. *County Commission,* 488 U.S. 336 (1989). These decisional conflicts are explained and analyzed in Part IA, *infra.*

What makes review of these conflicts compelling is the profound economic consequences of the discriminatory practices employed by Kansas taxing officials. In Kansas alone, millions of dollars in taxes have been wrongfully collected in violation of the Fourteenth Amendment, which by itself is sufficient to warrant review by this Court. Compare *Barclays Bank, PLC* v. *Franchise Tax Bd.,* Nos. 92-1384, 92-1839, *cert. granted,* 114 S. Ct. 379 (Nov. 1, 1993). The widespread impact of the state's unlawful tax enforcement practice is fully explained in Part IB, *infra.*

The second important federal question raised by the decision below is whether the manifestly discriminatory treatment of the pipelines that violates state law can be justified on the basis that Section 11503(d) of the 4-R Act preempts state taxing officials from enforcing the state's policy of equal treatment. This Court's recent decision in *Department of Revenue* v. *ACF Industries, Inc.,* 114 S. Ct. 843 (1994), as well as more general preemption principles embodied in this Court's supremacy clause cases, completely undercuts the Kansas Supreme Court's analysis. Accordingly, at a minimum, this Court should remand this case to the court below to consider the im-

pact of *ACF* on its decision. This second issue is analyzed in greater detail in Part II, *infra*.

I.

A. The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In structuring taxation schemes " 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' " *Williams* v. *Vermont*, 472 U.S. 14, 22 (1985) (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)). Nevertheless, this Court has held that the Equal Protection Clause prohibits a state from imposing an unequal ad valorem tax on different classes of property unless its classification of property "rationally furthers a legitimate state interest," and the distinctions it creates are not "arbitrary or irrational." *Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2332 (1992). Specifically, the Court has held that the Equal Protection Clause prohibits the " '[i]ntentional systematic undervaluation' " of property within the same classification. *Allegheny*, 488 U.S. at 345 (quoting *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U.S. 350, 353 (1918)).

Under *Allegheny*, states are not free to adopt as a matter of state law one set of legislative tax policies, but permit their taxing officials to implement a separate practice that promotes solely the economic interests of a favored class of taxpayers. This is precisely what Kansas has done in this case and the decision below condoning this discrimination warrants further review.

1. The decision of the Kansas Supreme Court directly conflicts with the decision of the Nebraska Supreme Court. In *Northern Natural Gas Co.* v. *State Board of Equalization & Assessment*, 443 N.W.2d 249 (Neb. 1989), *cert.*

denied, 493 U.S. 1078 (1990), several companies with pipelines running through Nebraska challenged the state tax commissioner's provision of favorable tax treatment to several railroads. Nebraska's Constitution and statutes did not classify tangible property for differential treatment under its ad valorem taxation scheme. Nebraska law required that railroad and pipeline property—like all other tangible property—be assessed equivalently.

However, the Nebraska tax commissioner did not collect any personal property tax from certain railroads and car companies. The Nebraska Board of Equalization and Assessment also refused to enjoin the tax commissioner from collecting personal property taxes from the pipelines. The Nebraska Supreme Court, relying on this Court's decision in *Sioux City Bridge Co.* v. *Dakota County,* 260 U.S. 441 (1923), found that the failure of the state tax officials to treat the property of railroads and pipelines in the same manner violated the Equal Protection Clause. *Northern,* 443 N.W.2d at 256. The Nebraska Supreme Court noted that it made no difference how the undervaluation had come to pass. *Id.* The undervaluation of the railroad property caused the valuations of the other property to be disproportionately high, when state law required the two to be equal. *Id.*

The Kansas court attempted to distinguish *Northern* solely on the basis that the Nebraska Constitution did not distinguish between railroad and other property. App. 15a. But Kansas law is no different from Nebraska law in this regard. Kansas tax law classifies railroads and pipelines together in the subclass of "public utilities." Kan. Stat. Ann. § 79-5a01(a) (1989) (defined as "every individual, company, corporation . . . or receivers that now or hereafter are in control, manage or operate a business of . . . [a] railroad or . . . pipeline[]"). As noted above, the Kansas Constitution, as well as its tax law, requires that the subclass of public utility personal property be assessed and taxed in the same manner and classifies the real property of railroads and pipelines in the same subclass. See

also App. 19a ("Art. 11, § 1 treats all public utility property alike"). The property of railroads and pipelines also is assessed centrally by respondent rather than by local county assessors. Kan. Stat. Ann. § 79-1404(15) (1989).

In sum, with respect to the only classification of property relevant to this case, Kansas has classified railroads and pipelines *together* as public utilities and it requires that public utilities be treated alike. Under state law, the property of railroads and pipelines is therefore similarly situated. Accordingly, railroad and pipeline property in both Kansas and Nebraska was treated identically as a matter of state law. As a consequence, the result reached by the Kansas Court upholding this taxing scheme in the instant case is flatly inconsistent with the decision of the Nebraska Supreme Court in *Northern* that this scheme violates the Fourteenth Amendment. Because this important and recurring question of the proper treatment of taxing schemes under the Equal Protection Clause has been resolved in conflicting ways by the highest courts of different states, the decision of the court below cries out for review by this Court.

2. The decision below also conflicts with the applicable decisions of this Court. The court below concluded, without discussing any relevant decisions of this Court, that the tax treatment the state had provided did not violate the Equal Protection Clause. However, because Kansas has established a taxation scheme classifying railroads and pipelines together, it cannot intentionally and systematically undervalue a favored taxpayer by enforcement practice without violating the equal protection rights of those whose property in the same subclass is taxed fully.

In *Allegheny* this Court examined West Virginia's ad valorem property tax system. The Court noted that " '[t]he equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.' " 488 U.S. at 345 (quoting *Hillsborough* v. *Cromwell,* 326 U.S. 620, 623 (1946)). West

Virginia made no distinctions between the properties unequally assessed in Webster County. *Id.* at 345. Instead, the county assessor on her own initiative systematically assessed these similarly situated properties by a method that resulted in significantly different valuations. *Id.* at 338, 345. This Court unanimously held that such an "intentional systematic undervaluation" of some of the property in the state-created class violated the Equal Protection Clause, *id.* at 346, and did not rationally achieve the purposes of the state ad valorem property taxation scheme. See *Nordlinger*, 112 S. Ct. at 2335 (discussing *Allegheny*).[3]

In the tax years in question, respondent voluntarily and repeatedly provided certain railroads with favorable tax assessments for real property and also exempted the majority of these railroads' personal property from taxation altogether. Respondent's discriminatory practice of systematically undervaluing the properties of certain railroads amounted to an "aberrational enforcement policy" that this Court consistently has recognized as a violation of the Equal Protection Clause. *Allegheny*, 488 U.S. at 344 n.4 & 345; *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239 (1931) (undervaluation of shares of certain bank stocks within class); *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments*, 284 U.S. 23 (1931) (undervaluation of coal-rich land in same class but adjacent to river); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923) (undervaluation created by discounted assessments given other property in class); *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20 (1907) (undervaluation created by failure to carry out equalization for all corporations in class).

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[3] California's state-imposed ad valorem property taxation scheme, examined and upheld by this Court in *Nordlinger*, provided for the classification and valuation of property based on duration of ownership. California's disparate treatment of "similar" property, unlike West Virginia's or Kansas', specifically was designed by the state rationally to further legitimate state interests. *See Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2333 (1992).

The Kansas ad valorem property taxation scheme in the instant case, like the one in *Allegheny*, made no distinction between the properties subjected to unequal treatment, whether by law, implicit policy distinctions, see *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362 (1940), or by mistake, see *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U.S. 350 (1918). Respondent voluntarily and repeatedly gave certain railroads in the subclass favorable tax treatment not afforded to the rest of the class. But the state's policy continued to be uniform treatment for all public utilities. See App. 19a. Thus, as in *Allegheny*, no legitimate state interest is rationally furthered by the deliberate actions of respondent. Indeed, the Kansas Supreme Court, the final arbiter of state law, was "at a loss" to explain the basis for the disparate treatment. App. 8a. This is not surprising; no basis in legitimate state policy exists. Accordingly, the undervaluation of the property of only certain railroads deprived petitioners of equal protection under Kansas law.

B. Kansas' unlawful tax enforcement practice has an immediate and profound economic impact on petitioners. Petitioners own significant amounts of property in Kansas, though they do not participate in the political processes of the state since they are not residents or voters in the communities the pipelines pass through. As of 1991, petitioners' assessed property value in Kansas was approximately $117 million: $109 million in personal property and $8 million in real property. If the pipelines had received uniform treatment with railroads, $96.3 million of the assessed value of their personal property would not have been taxed. In 1991, petitioners paid approximately $12 million in property taxes. Railroads in the same subclass receiving special tax treatment paid only approximately $3 million for similar amounts of property that year.

Moreover, the broader effect of this type of disparate tax treatment against certain interstate common carriers

is widespread. In Kansas alone, 18 taxpayers—including such diverse entities as MCI Telecommunications Corp. and Kansas City Power & Light Company in addition to pipelines—currently are contesting their 1992 tax assessments. And claims like those brought by petitioners, asserting entitlement to equality in their tax treatment as compared to railroads receiving favorable treatment under the 4-R Act, are pending in several other States.[4] Therefore, the equal protection issue in this case not only presents jurisprudential conflicts that warrant this Court's resolution, but also imposes significant financial harms that justify this Court's review of the decision below.

II.

A. As previously explained, the Kansas Supreme Court recognized that the state constitution "treats all public utility property alike." App. 19a. In particular, it was stipulated that petitioners' pipeline property is in the same category as railroad property under the classification scheme established by the Kansas Constitution and statutes. *Id.* at 24a, ¶ 6. In addition to the general provision of Article 11 of the Kansas Constitution providing for "a uniform and equal basis of valuation and rate of taxation of all property," each of the provisions of the constitution

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[4] In Wisconsin, railroads and pipelines are in the same statutory classification, Wis. Stat. Ann. § 76.01 *et seq.* (West 1993), but state tax officials have been removing 80% of the railroads' personal property from the calculation of their unit values. *See, e.g., ANR Pipeline Co.* v. *Wisconsin Dep't of Revenue,* No. 93-CV-4343 (Wis. Cir. Ct. filed May 9, 1994). In Iowa, railroads and pipelines are treated legislatively the same in all respects, Iowa Code Ann. § 427A.1 (West 1993). However, railroads have been given an 80% exemption for their personal property by state taxing officials. *See, e.g., In re ANR Pipeline Co.,* No. 727 (Iowa St. Bd. Tax Rev. filed Jan. 21, 1994). In Louisiana, railroads and pipelines are classified together by the legislature as public service properties, La. Rev. Stat. Ann. § 47:1851(M) (West 1993). However, the state tax commission has been assessing railroads at 15% of fair market value. The public service properties being discriminated against are currently contemplating litigation.

defining subclasses of property directs that the "property shall be . . . assessed uniformly as to subclass." See *id.* at 36a-37a (quoted at App. 3a). Nevertheless, the Kansas Supreme Court rejected petitioners' argument that pipeline property was entitled to the same tax treatment as the State had given railroad property. *Id.* at 15a-16a.

The court offered no state-law reason for that holding. Instead, it concluded that the 4-R Act required more favorable treatment of railroads by taking railroad property out of the subclasses to which state law otherwise assigned it: "Railroad property was thereby made an exception to subclasses to which public utility property was assigned." *Id.* at 12a. Without regard to the state law mandate of uniformity within a state-law subclass, the state supreme court thus held that the 4-R Act on its own overrode the classifications of state law and necessarily precluded equal treatment of railroad property with other property classes.[5] This federal preemption ruling was the

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[5] The Kansas Supreme Court observed that the general constitutional clause mandating a "uniform and equal basis of valuation and rate of taxation" does not apply to the assessment rates given to the various classes (App. 12a). However, this holding provides no independent state-law basis for the decision below. First, the observation simply does not address the distinct question whether equal treatment of pipeline and railroad property is required by the *separate* state-law commands to apply assessment rates "uniformly as to subclass." The Kansas Supreme Court ignored that question and ruled that the 4-R Act displaced the state classification scheme. Second, the court's reading of the 4-R Act also allowed the court to avoid discussing whether the "uniform and equal basis" clause, even if it leaves "assessment rates" outside its reach, nonetheless applies to exemptions—which are treated separately from assessments under both the state constitution (*compare* Kan. Const. art. 11, § 1(b)(1) *with* § 1(b)(2) *and* the 4-R Act, 49 U.S.C. § 11503 (*see Department of Revenue* v. *ACF Indus., Inc.*, 114 S. Ct. 843 (1994)). Of course, a principal source of the discriminatory treatment of pipelines at issue here is the 80% exemption given to the personal property of certain railroads.

essential basis for the court's rejection of petitioners' claim.[6]

The preemption basis for the ruling below is confirmed by the reasons advanced by the state tax authorities for rejecting petitioners' uniformity claim—resting entirely on federal preemption, without reliance on any independent state-law ground that would dispute the existence of a state-law uniformity command.[7] The Board of Tax Appeals, in the decision reviewed by the Kansas Supreme Court, acknowledged that railroad and pipeline property fell within the same classification under the state constitution, *id.* at 24a, ¶ 6, and that the constitutional "principles of uniformity *within a class* continue to apply," *id.* at 30a, ¶ 22 (emphasis in original), so that state law of its own force required "uniformity within the class of utility property, both real and personal," *id.* at 30a-31a, ¶ 23. The Board concluded, however, that the 4-R Act overrode the state-law command: "the presence of federal legislation adopting a different standard for railroad property and no other utility property not only creates, but compels, a distinction to be made. We conclude that the 4-R Act creates an exception within the class of public utility property." *Id.* at 31a, ¶ 23. Thus, expressly relying on "federal preemption," *id.* at 29a, ¶ 19, the Board concluded that, regardless of any uniformity principle under the Kansas Constitution, the 4-R Act compelled favored treatment of railroads: "Kansas cases plainly state that uniformity is to be enforced to the ex-

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[6] This ruling is reviewable here even if the state court opinion framed its conclusion in part in terms of state law (App. 14a), since the reliance on a federal preemption ruling is clear. *See Michigan* v. *Long*, 463 U.S. 1032, 1038 n.4 (1983); *State Tax Comm'n* v. *Van Cott*, 306 U.S. 511, 514-15 (1939).

[7] Any other position would have been surprising given how fundamental uniformity principles have been to state tax schemes in Kansas and elsewhere. *See, e.g., Kansas ex rel. Stephan* v. *Martin*, 608 P.2d 880 (Kan. 1980); *Greene* v. *Louisville & I. R.R.*, 244 U.S. 499 (1917); J. Hellerstein & W. Hellerstein, *State and Local Taxation* 46-49 (5th ed. 1988).

tent possible. . . . Here, however, the 4-R Act purportedly requires departure from the 30% standard set by Kansas Constitution, Article 11, Section 1(b)." *Id.* at 31a, ¶ 24.

In defending the Board of Tax Appeals' decision before the state supreme court, respondent made the same preemption argument. Respondent expressly recognized that "railroad property is required to be equalized with other public utility property." Brief of Appellee, *In re ANR Pipeline Co.*, 866 P.2d 1060 (Kan. 1994) (No. 92-69116-AS), at 7 (citing Kan. Const. art. 11, § 1 (1989)). Respondent contended, however, that the equalization standard of state law could not apply, giving one and only one reason: "the Kansas property tax classification system, as it pertains to rail transportation property, has been preempted by the 4-R Act and its classification system." *Id.* at 8. See also *id.* at 5 ("[t]he 4-R Act creates a federal property tax classification system for railroads that preempts inconsistent provisions of state property tax classification systems"); *id.* at 7, 10, 11.

B. The Kansas Supreme Court's preemption ruling is inconsistent with the most elementary principles of preemption analysis. Nothing in the 4-R Act creates a new federal classification system that automatically removes railroad property from the categories assigned by state law. Rather, by its plain terms, the 4-R Act requires nothing more than that railroad property be assessed and taxed at rates no higher than those applicable to commercial and industrial property (as defined). 49 U.S.C. § 11503(b), App. 34a-35a. As long as that result is produced, the 4-R Act has nothing to say about how a state classifies taxpayers or whether it insists on treating equally all taxpayers within a specified classification. See, *e.g.*, *ABF Freight Sys., Inc.* v. *Tax Div.*, 787 F.2d 292, 295-96 (8th Cir. 1986); *Arizona* v. *Atchison, T. & S.F. R.R.*, 656 F.2d 398, 408 (9th Cir. 1981); *Clinchfield R.R.* v. *Lynch*, 784 F.2d 545, 551 (4th Cir. 1986).

In particular, the 4-R Act nowhere in its text or policy precludes a state from requiring uniform treatment of

other public utilities to match the treatment required for railroads. The statute is a guarantee against state discrimination, not a federal mandate for favored treatment of railroads. See *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987) (4-R Act is "Congress' solution to the problem of discriminatory state taxation of railroads"); *Department of Revenue* v. *ACF Indus., Inc.*, 114 S. Ct. 843, 846 (1994). It would turn the equality guarantee of the 4-R Act on its head to read it as preempting state law that pursues the same principle of equality.

There simply is no inconsistency—in the sense of a direct conflict in requirements *or* frustration of congressional purposes—between a state insistence on pipeline-railroad equality and the federal commitment to a prescribed treatment of railroads. In *California Federal Savings & Loan Association* v. *Guerra*, 479 U.S. 272 (1987), this Court rejected a similar preemption argument involving a non-discrimination law and a law mandating a particular level of treatment for certain persons. This Court explained that the two laws were fully compatible, because both could be readily satisfied by affording all persons the specified level of treatment. *Id.* at 290-92; see *id.* at 295-96 (Scalia, J., concurring in the judgment).[8] Precisely the same compatibility is present here: Kansas may, with entire consistency, both meet its 4-R Act obligation to railroads and treat pipelines equally. Accordingly, there can be no preemption of a state's adherence to its classification scheme by affording pipelines the same treatment as the similarly classified railroads.

This conclusion is made inescapable by this Court's recent decision in *ACF*, 114 S. Ct. 843. First, the Court ex-

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[8] In *Guerra*, federal law provided for equal treatment and state law specified the level of treatment to be given. That fact, while it would have determined which principle prevailed if an inconsistency had been found, was irrelevant to the Court's determination that there was no inconsistency between the two laws at all.

plained there that any construction of the 4-R Act that expands its preemptive scope must be especially clear and manifest in the statute, because the statute impinges on traditional state powers of taxation. *Id.* at 850-51. See also *BFP* v. *Resolution Trust Corp.*, 62 U.S.L.W. 4359, 4363 (U.S. May 23, 1994). If the Kansas Supreme Court's broad finding of 4-R Act preemption of state classifications cannot be defended under ordinary preemption principles, it is even more starkly indefensible under that special standard. Second, and more particularly, *ACF* held that the 4-R Act, while speaking explicitly to assessment and tax rates, generally does *not* have preemptive effect with respect to a State's property tax exemptions. 114 S. Ct. at 850 (statute "reflects a determination to permit the States to leave their exemptions in place"). After *ACF*, then, the 4-R Act cannot be read as displacing state equalization requirements as applied to state taxing authorities' exemption decisions—the principle basis of petitioners' challenge relating to personal property. The Kansas Supreme Court decision is thus flatly inconsistent with *ACF*.[9]

C. The Kansas Supreme Court's conclusion that the 4-R Act completely displaces state classification schemes is inconsistent with the conclusion of the federal courts of appeals. See *supra* at p. 16. Moreover, the state court's holding is inconsistent with the result reached by the Nebraska Supreme Court in *Northern Natural Gas Co.* v. *State Board of Equalization & Assessment*, 443 N.W. 2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990). Applying the uniformity clause of the state constitution, the Nebraska Supreme Court held that a pipeline was entitled to the same tax treatment for its personal property as the state, acting pursuant to the 4-R Act, had afforded railroad property. *Id.* at 255-56, 260. That is

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[9] *ACF* was decided three days after the decision below. Although the Kansas Supreme Court was asked to consider *ACF* on rehearing, the court refused. Accordingly, a remand for such consideration ordered by this Court would be appropriate.

precisely the relief denied to petitioners by the Kansas Supreme Court, which expressly rejected *Northern*. App. 15a.

The issue is hardly an isolated one. In addition to the several other public-utility taxpayers with the same claim pending in Kansas, see *supra* at p. 13, the issue has arisen in other states. The issue already has been decided incorrectly in two states whose courts have reached the issue. In Tennessee, the state supreme court held that the 4-R Act "preempted the state classification of railroads" and accompanying state-law guarantee of "equal and uniform" tax treatment. *Federal Express Corp.* v. *Tennessee State Bd. of Equalization*, 717 S.W.2d 873, 876 (Tenn. 1986). See App. 17a-18a. See also *Alabama* v. *Colonial Pipeline Co.*, 471 So. 2d 408, 412-13 (Ala. Civ. App. 1984) ("the state is specifically forbidden to classify the property of motor carriers as Class I property by [the 4-R Act]"). And, as noted above, *supra* at p. 13 n.4, claims such as these are pending in several other states that do not classify railroads and pipelines separately. This Court should clarify the effect, if any, of preemption on state classifications by the 4-R Act in this recurrent circumstance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 13, 1994

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 69,116

IN THE MATTER OF THE APPEAL OF ANR PIPELINE COMPANY; COLORADO INTERSTATE GAS COMPANY; NORTHERN NATURAL GAS COMPANY; MAPCO FRACTIONATOR, INC.; MAPCO AMMONIA PIPELINE, INC.; MID-AMERICA PIPELINE COMPANY; and ENRON LIQUIDS PIPELINE COMPANY From a Decision of THE DIRECTOR OF PROPERTY VALUATION of THE STATE OF KANSAS.

SYLLABUS BY THE COURT

1. In making a determination of federal preemption, a court should examine those concerns emphasized by Congress in enacting the legislation. State law should be preempted only to the extent necessary to protect achievement of the purposes of the federal act in question.

2. An order of the Board of Tax Appeals denying pipeline companies the favorable state tax treatment afforded railroads by federal law and a federal court consent decree thereunder is considered and held not to be violative of: (1) the Uniform and Equal Clause of art. 11, § 1 of the Kansas Constitution; (2) the Equal Protection Clauses of the United States and Kansas Constitutions; or (3) the Commerce Clause of the United States Constitution.

Appeal from the Kansas Board of Tax Appeals. Opinion filed January 21, 1994. Affirmed.

Richard D. Greene, of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Wichita, argued the cause, and *Robert W. Coykendall,* of the same firm; *Karen Pauley, Virginia Amend,* and *Nancy Morgan,* of ANR Pipeline Company and Colorado Interstate Gas Company, of Colorado Springs, Colorado; *E. Chris Kaitson,* of Northern Natural Gas Company and Enron Liquids Pipeline Company, of Houston, Texas; and *Charlene Sinclair,* of MAPCO Fractionator, Inc., MAPCO Ammonia Pipeline, Inc., and Mid-America Pipeline Company, of Tulsa, Oklahoma, were with him on the briefs for appellants.

William E. Waters, of Kansas Department of Revenue, of Topeka, argued the cause, and *Laura E. Johnson,* of the same department, were with him on the brief for appellee.

Benjamin J. Neill and *Thomas H. Bornholdt,* of Neill, Bornholdt & Terrill, of Overland Park, were on the brief for *amicus curiae* Kansas Association of Counties.

Lisa Ross Wetzler, assistant county counselor, Johnson County, was on the brief for *amici curiae* Board of County Commissioners of Johnson County, Kansas, and County Appraiser of Johnson County, Kansas.

The opinion of the court was delivered by

McFARLAND, J.: The appellants herein, with one exception, are open access common carriers that transport fuels in interstate commerce. The one exception, Mapco Fractionator, Inc., provides fractionating services to shippers of natural gas. Each is classified as a public utility for real and personal property tax purposes. Each was unsuccessful in its effort before the Director of Property Valuation (DPV) to have its property assessed on the same bases as is railroad property. Appeals were taken to the Board of Tax Appeals (BOTA), which upheld the decisions of the DPV. The appellants appeal from said

BOTA order. The appellants contend the BOTA order is in violation of the uniform and equal requirement of art. 11, § 1 of the Kansas Constitution, the Equal Protection Clauses of the Kansas and United States Constitutions, and the Commerce Clause of the United States Constitution.

The appeals were presented to BOTA on stipulated facts. Here, as there, only questions of law are presented for determination. The circumstances giving rise to the controversies herein may be stated as follows. The tax years 1990 and 1991 are involved. At all pertinent times, art. 11, § 1(b) of the Kansas Constitution provided:

> "(1) The provisions of this subsection (b) shall govern the assessment and taxation of property on and after January 1, 1989, and each year thereafter. Except as otherwise hereinafter specifically provided, the legislature shall provide for a uniform and equal basis of valuation and rate of taxation of all property subject to taxation. The provisions of this subsection (b) shall not be applicable to the taxation of motor vehicles, except as otherwise hereinafter specifically provided, mineral products, money, mortgages, notes and other evidence of debt and grain. Property shall be classified into the following classes for the purpose of assessment and assessed at the percentage of value prescribed therefor:
>
> "Class 1 shall consist of real property. Real property shall be further classified into four subclasses. Such property shall be defined by law for the purpose of subclassification and assessed uniformly as to subclass at the following percentages of value:
>
> (A) Real property used for residential purposes including multi-family residential real property 12%
>
> (B) Land devoted to agricultural use which shall be valued upon the basis of its argicultural

income or agricultural productivity pursuant to section 12 of article 11 of the constitution 30%

(C) Vacant lots 12%

(D) All other urban and rural real property not otherwise specifically subclassified 30%

"Class 2 shall consist of tangible personal property. Such tangible personal property shall be further classified into six subclasses, shall be defined by law for the purpose of subclassification and assessed uniformly as to subclass at the following percentages of value:

(A) Mobile homes used for residential purposes 12%

(B) Mineral leasehold interests 30%

(C) Public utility tangible personal property .30%

(D) All categories of motor vehicles not defined and specifically valued and taxed pursuant to law enacted prior to January 1, 1985 ..30%

(E) Commercial and industrial machinery and equipment which, if its economic life is seven years or more, shall be valued at its retail cost when new less seven-year straight-line depreciation, or which, if its economic life is less than seven years, shall be valued at its retail cost when new less straight-line depreciation over its economic life, except that, the value so obtained for such property, notwithstanding its economic life and as long as such property is being used, shall not be less than 20% of the retail cost when new of such property 20%

(F) All other tangible personal property not otherwise specifically classified 30%

"(2) All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, farm machinery and equipment, merchant's and manufacturer's inventories and livestock and all household goods and personal effects not used for the production of income, shall be exempted from property taxation."

This article was substantially amended in 1992, effective January 1, 1993, but said amendments are not at issue herein.

Under the provisions applicable herein, real and personal property owned by public utilities was to be assessed at 30 percent. The appellants and railroads are public utilities. K.S.A. 79-5a01.

In 1976, Congress enacted the Railroad Revitalization & Regulatory Reform Act of 1976 (Pub. L. 94-210, 90 Stat. 31, 54-5 [codified at 49 U.S.C. § 11503 (1988]). The Act, commonly referred to as the 4-R Act, provides, in pertinent part:

"(a) In this section—

(1) 'assessment' means valuation for a property tax levied by a taxing district.

(2) 'assessment jurisdiction' means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) 'rail transportation property' means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 U.S.C. §§ 10501 *et seq.*].

(4) 'commercial and industrial property' means property, other than transportation property and land used primarily for agricultural purposes or

timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

"(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 U.S.C. §§ 10501 *et seq.*].

"(c) Notwithstanding section 1341 of title 28 [28 U.S.C. § 1341] and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the

ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district."

The purpose of the 4-R Act was to prohibit discriminatory taxation of railroad real and personal property by state and local property tax laws and to promote the revitalization of the railway system nationwide. See *Clinchfield R. Co. v. Lynch,* 784 F.2d 545, 551 (4th Cir. 1986); *State of Ariz. v. Atchison, T. & S.F.R. Co.,* 656 F.2d 398, 400 (9th Cir. 1981).

The 4-R Act spawned years of federal litigation wherein railroads sought to utilize it to reduce their real and personal property taxes in Kansas. See, *e.g., Atchison, Topeka & S.F.Ry. Co. v. Lennen,* 640 F.2d 255 (10th Cir. 1981); *Atchison, Topeka and Santa Fe Ry. Co. v. Lennen,* 552 F. Supp. 1031 (D. Kan. 1982), *aff'd in part, rev'd in part* 732 F.2d 1495 (10th Cir.

1984); *Atchison, T. & S.F.Ry. Co. v. Lennen,* 531 F. Supp. 220 (D. Kan. 1981).

That litigation ended in 1989 with the entry of consent decrees. The parties rely on the decree entered on August 11, 1989, in *Burlington Northern Railroad Company v. Rolfs,* D. Kan., No. 89-4124-R, filed August 11, 1989. The effect of this decree was to fix the railroads' assessment rate for real property at 25 percent for 1990 and 22.3 percent for 1991. The parties have stipulated that 80 percent of the railroads' personal property was exempted from taxation with the balance of 20 percent to be assessed at 30 percent of the value. Like BOTA, we are at a loss from the record to see the basis for this exemption, but accept the parties' stipulation for the purposes of this appeal.

The appellants' basic position is quite simple and direct. They believe they are entitled to the same deal the railroads received for the tax years 1990 and 1991 as a result of the consent decree. There is no challenge herein to any portion of the decree. The appellants are seeking only to be taxed on the same basis as to their real and personal property for the years in dispute in the respective cases.

UNIFORM AND EQUAL

For their first issue, appellants contend that the disparate treatment between pipelines and railroads violates the Kansas constitutional mandate of uniform and equal treatment among members of the same subclass. Under art. 11, § 1(b), pipeline and railroad real estate are in subclass (D) to be assessed on the basis of 30 percent of value, and their tangible personal property is in subclass (C), also to be assessed at 30 percent of value.

For many years art. 11, § 1 provided that all property was to be assessed on a uniform basis with exceptions thereto being limited to particular types of property, regardless of ownership.

Under this system, for example, typewriters of the same make and model, purchased the same day, should be assessed at the general rate regardless of the nature of the usage thereof by the respective owner. It would matter not whether a particular typewriter was owned by a public utility, a manufacturer of goods, or a grocery store. The philosophy underlying this concept was set forth in *Wheeler v. Weightman,* 96 Kan. 50, 58, 149 Pac. 977 (1915), as follows:

> "The essentials [of the Uniform and Equal Clause] are that each man in city, county, and state is interested in maintaining the state and local governments. The protection which they afford and the duty to maintain them are reciprocal. The burden of supporting them should be borne equally by all, and this equality consists in each one contributing in proportion to the amount of his property. To this end all property in the state must be listed and valued for the purpose of taxation, the rate of assessment and taxation to be uniform and equal throughout the jurisdiction levying the tax."

Under the 1985 amendments to art. 11, § 1, real estate was essentially classified by usage, and personal property was essentially classified by ownership. This basic alteration in the scheme of taxation must be borne in mind when reading our earlier cases.

The appellants contend that one of these cases, *Voran v. Wright,* 129 Kan. 601, 284 Pac. 807 (1930), is dispositive of this issue. We do not agree. The DPV and the *amici* herein contend *Voran* is inapplicable. Their reasons vary. The pertinent portion of art. 11, § 1 involved in *Voran* was as follows:

> "The legislature shall provide for a uniform and equal rate of assessment and taxation, *except that mineral products, money, mortgages, notes and other evidence of debt may be classified and taxed uniformly as to class as the legislature shall provide.* All

> property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family, shall be exempted from taxation." (Emphasis in original.) 129 Kan. at 606.

Of this provision the *Voran* court stated:

> "Whatever may have been proper as to classification of owners under this section before the amendment, there can no longer be any question in that regard. A classification as to owners is not now permissible. The only classification authorized or tolerated by this constitutional provision is that of property, and it makes no difference by whom it may be owned, whether by individual, merchant, manufacturer, banking institution or other corporation. Every classification is now limited to property, and only four kinds of property, viz., mineral products, money, mortgages, notes and other evidence of debt." 129 Kan. at 606-07.

The underlying problem in *Voran* was the taxation of the property of national banks. Of this the *Voran* court stated:

> "National banks, being governmental agencies, would not be subject to a tax imposed by the state, and the only way to reach the property of national banks was by an indirect method sanctioned by this act of congress. It is argued that the state could have taxed the shares of stock in national banks without the permission thus granted by congress, but it has been granted with requirements and restrictions, and this state and all others have attempted to comply with the restrictions and terms imposed rather than try to accomplish the same in disregard of such consent, even if it could have been so done.

"Instead of taxing the national bank on the valulation of its property, the act authorizes the state to tax its shares of stock against the holders thereof, but the act expressly prescribes that such tax shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state coming into competition with the business of national banks. This act is known as section 5219 of the Revised Statutes of the United States, which was amended in 1923 and again in 1926, and is in part as follows:

'Sec. 5219. The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

'1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

'(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks: *Provided,* That bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business,

> shall not be deemed moneyed capital within the meaning of this section.' " 129 Kan. 605-06.

In the effort to comply with the federal law and thus reach national bank property for taxation purposes, the Kansas Legislature enacted certain statutes. A federal court held that shareowners of national banks could not be subjected to the general ad valorem tax rate under section 5219. This left state bank shareowners being assessed at the general rate and national bank shareowners being assessed on the lower intangible tax rate. The *Voran* court, applying the constitutional provisions in effect at the time, held certain portions of one of the statutes unconstitutional and thereby permitted the plaintiff owners of state bank shares to be taxed at the intangibles tax rate, as were their counterparts owning national bank shares.

Voran is distinguishable in a number of respects from the situation before us. National bank property at the time in *Voran* was not taxable except by compliance with the federal act. Art. 11, § 1, in the form in effect in *Voran,* did not contain a classification system. There were no exceptions to the general rate other than for mineral products, money, mortgages, notes, and other evidence of debt which the legislature could classify and take uniformly throughout the particular class. Shares of stock were in none of these exceptions. The present form of art. 11, § 1 classifies real and personal property based in part upon usage or ownership.

The 4-R Act, as it applies to Kansas and as reflected in the consent decree, simply required that railroad property be assessed at no higher rate than commercial or industrail property. Railroad property was thereby made an exception to subclasses to which public utility property was assigned. This exception was amended into art. 11, § 1 in 1992, where the public utility real property subclass and the commercial and industrial subclasses provide:

"(5) Public utility real property, except railroad real property which shall be assessed at the average rate that all other commercial and industrial property is assessed 33%

"(6) Real property used for commercial and industrial purposes and buildings and other improvements located upon land devoted to agricultural use .....25%"

Likewise in the 1992 amendment, personal property subclasses for public utility and commercial and industrial property provide:

"(3) Public utility tangible personal property included inventories thereof, except railroad personal property including inventories thereof, which shall be assessed at the average rate all other commercial and industrial property is assessed 33%

....

SUPPLEMENTAL INFORMATION:

"(5) Commercial and industrial machinery and equipment which, if its economic life is seven years or more, shall be valued at its retail cost when new less seven-year straight-line depreciation, or which, if its economic life is less than seven years, shall be valued at its retail cost when new less straight-line depreciation over its economic life, except that, the value so obtained for such property, notwithstanding its economic life and as long as such property is being used, shall not be less than 20% of the retail cost when new of such property .....25%"

We agree with appellants that a "uniform and equal" requirement has been constant in art. 11, § 1, but there has been a pertinent shift in the application of the re-

quirement. In *Voran,* art. 11, § 1 essentially had all property in one grouping with certain specific types of property being excepted therefrom for classification, if the legislature desired. The *legislature was charged with providing a uniform and equal rate* of assessment and taxation for the general group and to tax the excepted types of property uniformly within their respective class. In contrast, the form of art. 11, § 1 before us *classifies all real and personal property* and *fixes the assessment rate for each subclass.* The legislature is charged with providing only a *uniform and equal basis for valuation and rate of taxation.* Thus, rate of assessment for particular property is now contained within the article and is not a matter for the legislature to determine on a uniform and equal basis. Under the article, public utility property is assessed at 30 percent.

This distinction has much to do with the result reached in *Voran.* Bank shares, not being in an exception, would ordinarily be in the general group. To bring national bank shares into the tax base, the legislature enacted legislation which ran afoul of federal law and resulted, as a result of a federal court decision, in state bank shares being taxed on a different basis than federal bank shares. Portions of the statutes which had led to this result were held violative of the legislature's duty to provide a uniform and equal rate of assessment and taxation.

In the case before us, the 4-R Act placed limitations on state taxation of railroad property. Railroad property had to be treated the same as "other commercial and industrial property." There can be little doubt that this is a preemption. If it is not a preemption, the 4-R Act is just a piece of paper suggesting railroads should be treated like other commercial and industrial property and the enforcement section thereof is surplusage. Clearly, that was not the Congressional intent in enacting the 4-R Act.

In *Goben v. Barry,* 237 Kan. 822, Syl. ¶ 3, 703 P.2d 1378 (1985), a preemption case, we held:

> "In making a determination of federal preemption, a court should examine those concerns emphasized by Congress in enacting the legislation. State law should be preempted only to the extent necessary to protect achievement of the purpose of the federal act in question."

The purpose of the 4-R Act was to benefit and revitalize railroads. The brief of the Department of Revenue states pipeline companies attempted unsuccessfully to obtain like federal legislation in their favor. The statement is not disputed. In any event, there is absolutely no indication in the record that Congress intended, by the enactment of 4-R, to preempt or affect how pipeline property was assessed or taxed by the states. Limiting the presumption of the 4-R Act to its purposes and application results in minimal interference with the classification system provided by art. 11, § 1.

The appellants argue that we should adopt the rationale of the Nebraska Supreme Court in *Northern Natural Gas Co. v. State Bd. of Equal.,* 232 Neb. 806, 443 N.W.2d 249 (1989). Nebraska held in favor of the pipelines in their quest to be afforded the same favorable treatment as railroads under the 4-R Act. We decline to do so. The Nebraska Constitution does not have property classifications and is more akin to art. 11, § 1 in the form applicable in *Voran.* We do not find the Nebraska rational persuasive on this issue.

In *Federal Exp. Corp. v. Tennn. State Bd.,* 717 S.W.2d 873 (Tenn. 1986), the Tennessee Supreme Court rejected a similar challenge on "uniform and equal" grounds. This case will be discussed in more detail in the next issue.

We conclude that the BOTA order refusing to afford the appellants their requested relief of having their prop-

erty assessed on the same basis as railroads is not violative of the uniform and equal provision of art. 11, § 1 of the Kansas Constitution.

EQUAL PROTECTION

For their second issue, appellants contend that BOTA order is violative of the Kansas and United States Constitutions' Equal Protection Clauses.

The 14th Amendment of the United States Constitution provides that no state can make or enforce a law which shall deny to any person within its jurisdiction the equal protection of the laws. Section 1 of the Bill of Rights of the Kansas Constitution provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Appellants do not argue the Kansas Constitution grants them any greater rights herein than does the United States Constitution. In the following discussion, we will refer only to the United States Constitution, but such discussion should be considered as being equally applicable to the Kansas Constitution argument.

Similar arguments were raised in two cases in other jurisdictions and rejected.

In *State v. Colonial Pipeline Co.*, 471 So. 2d 408 (Ala. Civ. App. 1984), the Alabama Court of Civil Appeals considered an oil pipeline's challenge to the assessment of its property at the public utility rate, which was the highest rate under Alabama's classification system. Colonial contended, *inter alia* that assessment of railroad property which was in the same classification as the pipeline at a lesser rate by virtue of the 4-R Act was violative of the Equal Protection Clause of the United States Constitution. The Alabama court stated:

> "If there may be some discrimination against Colonial, it is not arbitrary or unreasonable. Until the

state was specifically forbidden to tax the property of railroads at a higher assessment ratio than other commercial and industrial property by Congress in 49 U.S.C.A. § 11503, it classified the property of railroads as Class I property. Moreover, until forbidden to do so by the Circuit Court of Montgomery County in *Delta Airlines v. Department of Revenue,* Civil Action No. CV-80-116-G, the Department classified the property of airlines as utilities and taxed them as Class I property. The Tax Equity & Fiscal Responsibility Act of 1982, § 532 amending 49 U.S.C. § 1513(b) and (d), now has the effect of forbidding the state from assessing property of air carriers at a higher rate than other commercial and industrial property.

"Currently, the state is specifically forbidden to classify the property of motor carriers as Class I property by 49 U.S.C. § 11503a, which gives the motor carriers the same protection from high assessment rates that is afforded railroads and air carriers. Were it not for the supremacy of federal statutes over state law, airlines, trucklines and railroads, which are included in § 40-21-1, would be subject to the same Class I classification as is assigned Colonial's property. The preemption for tax purposes of those other entities does not destroy the classification by state law from which they were exempted and to which Colonial continues to belong." 471 So. 2d at 412-13.

In *Federal Exp. Corp. v. Tenn. State Bd.,* 717 S.W.2d 873, a taxpayer challenged its property assessment as a public utility rather than as commercial and industrial property. While ruling that the plaintiff taxpayer was a "public utility" for ad valorem taxation, the Tennessee Supreme Court turned aside the taxpayer's equal protection argument, stating:

> "Federal Express also argues that to assess its property for ad valorem tax purposes at 55% of its value, while assessing the property of railroads at the industrial and commercial rate of 30% of value, violates the Equal Protection Clause of the United States Constitution and Article II, Section 28 of the Tennessee Constitution, which requires 'the ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the state." The legislature classified railroads as public utilities and assessed them for ad valorem tax purposes at 55% of the value of their properties. However, the Congress of the United States, by Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503 ('4-R Act'), preempted the state classification of railroads and provided that they should be taxed as industrial and commercial property are taxed. The Act, having as its purpose the revitalization of railroads, affected only that business. Thus leaving in effect the state classification of other businesses as public utilities. The assessment of each of the businesses classed as public utilities is at the same ratio to value as the assessment of Federal Express property; consequently, we find no violation of either Article II, Section 28 of the Tennessee Constitution or the Equal Protection Clause of the Federal Constitution." 717 S.W.2d at 875-76.

To buy the appellants' argument, we would have to conclude the 4-R Act, in essence, eliminated the public utility subclass of personal property and transferred the same to the commercial and industrial subclass and made a major alteration to the "all other" subclass relative to real property. Again, appellants rely on the Nebraska case of *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, which held that taxing pipeline property on a different basis than railroad property was violative of the Equal Protection Clause as well as the uniform

and equal state constitutional requirement. Again, we find the Nebraska opinion unpersuasive.

Art. 11, § 1 treats all public utility property alike. The 4-R Act affects only railroad property and preempts the classification only as to such property.

Appellants complain that BOTA did not address its equal protection arguments in the order entered. It is true the BOTA order does not specifically refer to the equal protection argument as such, but, from the language employed therein and the cases cited, it is clear such was considered.

We conclude that the BOTA order is not violative of the Equal Protection Clauses of the United States or Kansas Constitutions.

COMMERCE CLAUSE

For their third issue, appellants contend the BOTA order is violative of the Commerce Clause of the United States Constitution.

The Commerce Clause provides that the "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. State regulation that is contrary to the constitutional principle of insuring that the conduct of individual states does not work to the detriment of the nation as a whole is invalid under the dormant Commerce Clause. *Wardair Canada v. Florida Dept. of Revenue,* 477 U.S. 1, 7-8, 91 L. Ed. 2d 1, 106 S. Ct. 2369 (1986).

Appellants assert that the property tax imposed by the State of Kansas upon pipeline property violates the Commerce Clause of the United States Constitution because the tax is discriminatory and unduly burdensome upon interstate commerce and violative of the third and fourth prongs of the four-prong test enumerated in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977). The four-

prong test enumerated in *Complete Auto* is: (1) The tax must be applied to an activity with a substantial nexus with the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided by the state. 430 U.S. at 279.

Appellants' argument on this issue lacks focus. Much of it seems to be a broad criticism of the classification system itself without any reference to railroads or the 4-R Act. This argument is difficult to understand. Public utility real estate is in the "all other" subclass which includes everything but residential property, agricultural land, and vacant lots. Public utility personal property has its own subclass. Pipeline operations crossing only county lines are assessed at the same rate as are those crossing state lines. Kansas Const., art. 11, § 1, K.S.A. 79-5a01. Pipeline property is valued by the unit valuation method and that valuation is apportioned to Kansas based on the percentage the pipeline company's original cost in Kansas bears to the total original cost of the company. See K.S.A. 79-5a04. Thus, as required by *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 69 L. Ed. 2d 884, 101 S. Ct. 2946 (1981), a pipeline company's property is assessed in Kansas in proportion to the pipeline's presence in the state.

The facts herein do not support a serious challenge based upon the Commerce Clause. The appellants contend the DPV and BOTA violated the Commerce Clause by not giving them the tax advantage that the 4-R Act mandated for the railroads. The appellants and the railroads are all engaged in interstate commerce. Kansas treated them alike in its constitution and in its statutory definition of public utilities. Congress chose to favor the railroads by enactment of the 4-R Act. Congress is the source of the alleged discrimination underlying this appeal. Appellants do not challenge the 4-R Act or the

consent decree thereunder. Rather, they want to ride piggyback to gain the same tax treatment in Kansas.

We find no violation of the Commerce Clause in BOTA's refusal to extend the 4-R Act and the federal court order to appellants and to order appellants' property be assessed on the same basis as railroad property.

We conclude that the BOTA order is not violative of the Commerce Clause of the United States Constitution.

The order of the Board of Tax Appeals is affirmed.

ABBOTT, J., not participating.

PRAGER, C.J., Retired, assigned.

APPENDIX B

BEFORE THE BOARD OF TAX APPEALS
OF THE STATE OF KANSAS

Docket No. 90-8930-PV and 91-6733-PV

IN THE MATTER OF THE APPEAL OF ANR PIPELINE COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 90-8927-PV and 91-6734-PV

IN THE MATTER OF THE APPEAL OF COLORADO INTERSTATE GAS COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 90-8926-PV and 91-6584-PV

IN THE MATTER OF THE APPEAL OF NORTHERN NATURAL GAS COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 91-6730-PV

IN THE MATTER OF THE APPEAL OF MAPCO FRACTIONATOR, INC., FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 91-6731-PV

IN THE MATTER OF THE APPEAL OF MAPCO AMMONIA PIPELINE, INC., FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 91-6732-PV

IN THE MATTER OF THE APPEAL OF MID-AMERICA PIPELINE COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 91-6585-PV

IN THE MATTER OF THE APPEAL OF ENRON LIQUIDS PIPELINE COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

ORDER

Now, on this 26th day of October, 1992, the above captioned matter comes on for consideration and decision by the Board of Tax Appeals of the State of Kansas.

The Board being fully advised in the premises, finds and concludes as follows:

1. The Board has jurisdiction of the subject matter and of the parties, a proper and timely appeal having been filed, pursuant to K.S.A. 74-2438.

2. The subject of this appeal challenges the Property Valuation Director's order certifying unit values for 1990 and 1991.

3. Each of the appellants are owners and operators of property classified as public utilities within the language of Article 11, Section 1(b), Class 1(D) (real estate) and Class 2(C) (personal property) and K.S.A. 79-5a01(a).

Findings of Fact

4. The parties entered into a series of stipulations at various times prior to the submission of these appeals. The Board finds that the proposed stipulations should be accepted as true, although we also note that some of the facts stated are not material to the decision reached here. The facts will not be restated except as necessary to the discussion of the issues.

Limitation of the Issues

5. Pursuant to the Stipulations submitted, the parties restricted the ambit of this appeal to certain issues. These grounds omitted from our consideration should be noted. The parties do not contest the appraisal or determination of value for either property owned by them or property owned by railroad companies. In other words, it is not alleged that the Division of Property Valuation appraised the property in an arbitrary or capricious manner. This is relevant in that some prior determinations rested on the ground that action by the appraising officials was so arbitrary as to constitute fraud. See *Board of Johnson County Comm'rs v. Greenhaw*, 241 Kan. 119, 734 P.2d 1125 (1987); *Commercial National Bank v. Board of County Commissioners*, 201 Kan. 280, 440 P.2d 634 (1968).

6. The parties agree that Kansas Constitution, Article 11, Section 1(b) classifies both railroads and these appellants in the same sub-classification of property.

7. The parties also agreed that railroad companies are assessed in Kansas pursuant to an Order Enjoining Assessment, Levy or Collection of Discriminatory Taxes, U.S. Dist. Ct., Kan. Docket No. 89-4124-R (Consent Decree) made part of the record by stipulation. A plain reading of the Consent Decree shows that real property owned by railroad companies is assessed at the rate of 25% for 1990 and 22.3% for 1991. Personal property owned by railroad companies is allegedly granted the benefit of exemption for 80% of their personal property in both years. Since these are stipulations among the parties, we shall not disturb their agreements. We note, however, that no evidence shows that the unit values certified for railroad companies reveals the method or amount of value removed as a result of personal property 'exemption'.

8. Finally, the parties agree that if a reduction in the level of assessment is found to be appropriate for these appellants, the same reduction in rates of assessment should be made as was allowed by the Consent Decree for railroads. The parties reserved questions related to the validity of the reduction ordered by the Consent Decree.

Statement of the Issue

9. The question presented is narrow. Given that property owned by railroad companies is assessed as an amount less than 30%, does the United States or Kansas Constitution require that other public utility property be assessed at similar rates?

Conclusions of Law

10. Even though reserved by the parties, we find it necessary to discuss the basis stated for reduction in the level of assessment for railroad property in the Consent Decree. The Decree is purportedly

authorized by the language of 49 U.S.C. Sect. 11503 (commonly known as the 4-R Act) barring discrimination against railroads under state tax statutes. The specific reductions in assessment rates are premised on the state sales ratio study and exemptions afforded non-railroad personal property. No other ground for the reduced assessment is contained in the Decree.

11. Kansas Courts have long held that reliance on the sales ratio study as a ground for reduced value or level of assessment is insufficient as a matter of law. *Northern Natural Gas Co. v. Williams,* 208 Kan. 407, 493 P.2d 568 (1972); *cert. den.* 406 U.S. 947, 92 S.Ct. 2408, 32 L.Ed. 2d 665; *Northern Natural Gas Co. v. Dwyer,* 208 Kan. 337, 492 P.2d. 147 (1971) *cert. den.* 406 U.S. 947, 92 S.Ct. 2408, 32 L.Ed. 2d 665; With respect to state taxation law, federal courts recognize that each state is free to propose and implement their own tax schemes without interference from federal authorities. Thus, the discretion to release certain property from the burden of taxation is unfettered unless in violation of the U.S. Constitution. "The State's power to classify is, indeed, extremely broad, and its discretion is limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary." *Phillips Chemical Co. v. Dumus Independent School District,* 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed. 2d 384 (1959). Kansas Constitution, Article 11, Section 1 provides a specific exemption to the exact same classes of personal property listed in the Decrees. No claim is made in this case that Kansas tax law violates the U.S. Constitution. The argument is that if railroads are afforded a reduced level of assessment, then other utility properties must be afforded the same treatment. In fact, the very premise of these appel-

lants is that the Decree is an appropriate result. It is fair to say that the appellant's request is that the ambit of the Decree be expanded to include other public utility property.

12. We are not at all convinced that the Decree represents a valid application of the 4-R Act, nor that the result complies with the body of Kansas decisions. There is no evidence to examine outside of the Decree. Nonetheless, if the underlying premise, which assumes that the Decree is valid, is false, then expansion of the doctrine merely exacerbates discrimination created by the Decree.

13. It is possible that the Decree is a fair settlement of the railroad owner's claim of discrimination. The result of that settlement is that railroad real property is assessed at less than 30% and the personal property is assessed at 20% of its contribution to the unit. In that context, we are required to examine whether the assessment of other public utility property may be assessed at 30% of fair market value.

14. It is obvious that a difference exists in the level of assessment between railroad property and other public utility property after the Decree. The appellants suggest that this difference is untenable when matched against Kansas and federal constitutional standards.

15. Appellants cite several cases for the proposition that discrimination is unconstitutional if it is the result of conscious and knowledgeable action by assessing officials. *Voran v. Wright,* 129 Kan. 601, 284 P. 807 (1930); *Von Ruden v. Miller,* 231 Kan. 1, 642 P.2d 91 (1982); *Addington v. Board of County Commissioners,* 191 Kan. 528, 382 P.2d 315 (1963).

16. Kansas Courts have long recognized that discrimination may exist, but only where a rational basis for such disparity is found. *State ex. rel. Stephan v. Martin,* 227 Kan. 456, 608 P.2d 880 (1980); *Commercial National Bank v. Board of County Commissioners,* 201 Kan. 280, 440 P.2d 634 (1968); *Wesley Medical Center v. McCain,* 226 Kan. 263, 597 P.2d 1088 (1979); *Missouri Pacific Railroad Co. v. McDonald,* 207 Kan. 744, 486 P.2d 1347 (1971). Federal Courts also apply the same standard of review. *Allegheny Pittsburgh Coal Co. v. County Commissioner of Webster County, West Virginia,* 488 U.S. 336, 102 L.Ed.2d 688, 109 S.Ct. 633 (1989); *Nordlinger v. Hahn,* 60 U.S.L.W. 4563 (June, 1992). Further, the various states are granted discretion to classify property for their own taxation purposes. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973); *Ohio Oil Co. v. Conway,* 281 U.S. 146, 74 L.Ed. 775, 50 S.Ct. 310 (1930). Our task, then, is to discover whether a rational basis can be found for the difference in assessment.

17. The change in assessment for railroads is premised solely on the presence of the 4-R Act (49 U.S.C. 11503). That Act provides:

> "The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of State may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio to the true market of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

18. Pipeline and other utility companies have not been as successful in their lobbying of Congress as the railroads. The Respondent's Brief traces the legislative history of legislation similar to 4-R, but favoring pipeline or other utility operators. The end result is that railroads are unique in the field of utilities in that they have the benefit of federal legislation whereas all other utilities do not. We find that the substance of this appeal is to create, by implication, that which Congress has specifically considered and rejected.

19. Is it appropriate that the Board or even Kansas take into account the presence of the 4-R Act? We think so. The appellants argue that federal preemption is not favored and should be avoided where possible. *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). In *Goben v. Barry*, 237 Kan. 822, 703 P.2d 1378 (1985) the Kansas Court agreed: "State law should be preempted only to the extent necessary to protect achievement of the purposes of the federal act in question."

20. The 4-R Act specifically adopts a standard of discrimination unprecedented in Kansas tax law,

e.g. [not to] "assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property". This test is similar to the criteria reviewed by the *Williams* court and rejected as legally insufficient. Nonetheless the Board finds that Congress is empowered to act in this area and that the legislation is entitled to some comity.

21. Does the 4-R Act or the Constitution mandate an expansive application of to [sic] public utilities? We think not. *Goben* makes clear that recognition of federal acts shall be limited to the clear import of their provisions and no more. It is also clear that Congress cannot be charged with an implied intent to afford similar treatment to other public utilities.

22. We view this case as similar to the decision in *Gordon v. Hiett,* 214 Kan. 690, 522 P.2d 942 (1974) wherein the Court determined that property assessed in excess of the statutory rate should be reduced to the level of assessment authorized by statute. The *minority* view expressed in *Gordon* would have reduced the level of assessment to the median or average assessment rate, but obviously that option was rejected by the *Gordon* Court. This Board does not ignore that the Kansas Constitution has been amended to allow classification of property among various classes since the *Gordon* decision. However, the principles of uniformity *within a class* continue to apply, in our view.

23. What we are required to enforce is uniformity within the class of utility property, both real and

personal. However, the presence of federal legislation adopting a different standard for railroad property and no other utility property not only creates, but compels, a distinction to be made. We conclude that the 4-R Act creates an exception within the class of public utility property. We also conclude that the congressional distinction between railroads and other utilities is a reasonable ground for different treatment. Faced with this development in the law, Kansas Courts have consistently maintained that differences in treatment should be minimized to the extent possible. *State ex. rel. v. Dwyer,* 208 Kan. 437, 493 P.2d 1095 (1972).

24. Kansas cases plainly state that uniformity is to be enforced to the extent possible. *Von Ruden, supra*; *Dwyer, supra.* Here, however, the 4-R Act purportedly requires departure from the 30% standard set by Kansas Constitution, Article 11, Section 1(b). We decline to authorize further departure from this standard as that was not the intent of Congress or the express direction from the legislature.

IT IS, THEREFORE, BY THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS, CONSIDERED AND ORDERED that the request for a reduced level of assessment of the appellant's property is denied.

If any party to this appeal feels aggrieved by this decision, they may file a written request for a rehearing with this Board. The written request for rehearing shall set forth specifically and in adequate detail the particular and specific respects in which it is alleged that the Board's order is unlawful, unreasonable, capricious improper or unfair. A copy of the request, together with all documents submitted therewith, shall be mailed to the opposing party at the same time the request is mailed to the Board. Failure to notify the opposing party shall render

any subsequent order voidable. The written request must be received by the Board within fifteen (15) days of the certification date of this order. If, at the end of fifteen days the Board has not received a written request for a rehearing, this order will become a final order from which no further appeal is available.

IT IS SO ORDERED.

[SEAL]

/s/ James P. Davidson
JAMES P. DAVIDSON
Attorney & Secretary

/s/ Jack Shriver
JACK SHRIVER
Chairman

/s/ Maybelle Mertz
MAYBELLE MERTZ
Member

MYRA B. GROSS
Member

/s/ Fred J. Hirsch
FRED J. HIRSCH
Member

/s/ Lawrence L. Tenopir
LAWRENCE L. TENOPIR
Member

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF KANSAS

Richard D. Greene
Morris Laing Evans Brock & Kennedy
200 W Douglas 4th Floor
Wichita, KS 67202-3084

No. 92-69116-AS

IN THE MATTER OF THE APPEAL OF ANR PIPELINE COMPANY; COLORADO INTERSTATE GAS COMPANY; NORTHERN NATURAL GAS COMPANY; MAPCO FRACTIONATOR, INC.; MAPCO AMMONIA PIPELINE, INC.; MID-AMERICA PIPELINE COMPANY; AND ENRON LIQUIDS PIPELINE COMPANY FROM A DECISION OF THE DIRECTOR OF PROPERTY VALUATION OF THE STATE OF KANSAS.

SUPREME COURT ORDER

You are hereby notified of the following action taken by the Court:

> Motion for Rehearing by Colorado Interstate Pipeline, et al. denied.

Date: 03/15/94.

CAROL G. GREEN
Clerk

APPENDIX D

49 U.S.C. § 11503. Tax discrimination against rail transportation property

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that ex-

ceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in 'controversy or citizenship of the parties,' a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

Kansas Constitution (1985)

Article 11.

§ 1. (a) System of taxation; classification; exemption. The provisions of this subsection (a) shall govern the assessment and taxation of property until the provisions of subsection (b) of this section are implemented and become effective, whereupon subsection (a) shall expire. The legislature shall provide for a uniform and equal rate of assessment and taxation, except that the legislature may provide for the classification and the taxation uniformly as to class of motor vehicles, mineral products, money, mortgages, notes and other evidence of debt or may exempt any of such classes of property from property taxation and impose taxes upon another basis in lieu thereof. All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and all household goods and personal effects not used for the production of income, shall be exempted from property taxation.

(b) System of taxation; classification; exemption. (1) The provisions of this subsection (b) shall govern the assessment and taxation of property on and after January 1, 1989, and each year thereafter. Except as otherwise hereinafter specifically provided, the legislature shall provide for a uniform and equal basis of valuation and rate of taxation of all property subject to taxation. The provisions of this subsection (b) shall not be applicable to the taxation of motor vehicles, except as otherwise hereinafter specifically provided, mineral products, money, mortgages, notes and other evidence of debt and grain. Property shall be classified into the following classes for the purpose of assessment and assessed at the percentage of value prescribed therefor:

Class 1 shall consist of real property. Real property shall be further classified into four subclasses. Such property shall be defined by law for the purpose of subclassifi-

cation and assessed uniformly as to subclass at the following percentages of value:

(A) Real property used for residential purposes including multi-family residential real property 12%

(B) Land devoted to agricultural use which shall be valued upon the basis of its agricultural income or agricultural productivity pursuant to section 12 of article II of the constitution 30%

(C) Vacant lots 12%

(D) All other urban and rural real property not otherwise specifically subclassified 30%

Class 2 shall consist of tangible personal property. Such tangible personal property shall be further classified into six subclasses, shall be defined by law for the purpose of subclassification and assessed uniformly as to subclass at the following percentages of value:

(A) Mobile homes used for residential purposes. 12%

(B) Mineral leasehold interests 30%

(C) Public utility tangible personal property .. 30%

(D) All categories of motor vehicles not defined and specifically valued and taxed pursuant to law enacted prior to January 1, 1985 ..... 30%

(E) Commercial and industrial machinery and equipment which, if its economic life is seven years or more, shall be valued at its retail cost when new less seven-year straight-line depreciation, or which, if its economic life is less than seven years, shall be valued at its retail cost when new less straight-line depreciation over its economic life, except that, the value so obtained for such property, notwithstanding its economic life and as long as such property is being used, shall not be less than 20% of the retail cost when new of such property 20%

(F) All other tangible personal property not otherwise specifically classified 30%

(2) All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, farm machinery and equipment, merchant's and manufacturer's inventories and livestock and all household goods and personal effects not used for the production of income, shall be exempted from property taxation.

No. 93-1995

JUL 7 1994

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ANR PIPELINE COMPANY, *et al.*,
Petitioners,

v.

DIRECTOR OF PROPERTY VALUATION, DEPARTMENT OF REVENUE OF THE STATE OF KANSAS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Equal Protection Clause requires state assessed interstate natural gas pipelines be given the same property tax treatment that state assessed railroads are given pursuant to the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503.

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No. 93-1995

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ANR PIPELINE COMPANY, *et al.*,

Petitioners,

v.

DIRECTOR OF PROPERTY VALUATION, DEPARTMENT OF REVENUE OF THE STATE OF KANSAS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Kansas Supreme Court entered on January 21, 1994.

STATEMENT OF THE CASE

The basic facts of the case are stated in the opinions below and in the petition. Summarized, the basic facts of the case are as follows:

In Kansas, pipelines are state assessed public utilities, as are railroads. Kansas has classified property for property tax purposes, placing pipelines and railroads in the public utility subclass. In 1991 and 1992, pipelines and railroads were valued at true market value as required by Kansas law. As permitted by the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act) (Pub. L. 94-210, 90 Stat. 31 [codified at 49 U.S.C. § 11503]) (Petitioners' Appendix D, 34a-35a), the railroads sued the State of Kansas in United States District Court for the District of Kansas. The 4-R Act requires railroads to be assessed at the same ratio to the true market value that the assessment of other commercial and industrial property has to the true market value of the other commercial and industrial property. Several months after the railroad lawsuits were filed, they were settled by the parties by the entry of consent decrees approved by the United States District Court for the District of Kansas. The settlement required the State of Kansas to assess railroad property at the same ratio to the true market value that the assessment of other commercial and industrial property has to the true market value of the other commercial and industrial property. The relief sought by the pipelines is to have the same assessment ratio applied to pipeline property that was applied to railroad property as a result of the consent decrees.

Petitioners do misstate several pertinent facts:

First, petitioners' allegation that the State of Kansas has singled out pipelines for higher tax treatment is totally unsupported by the record and is not true. As acknowledged by petitioners, these cases were presented to the State Board of Tax Appeals and the court below on stipulated facts. The parties stipulated that the property of the pipelines was valued at true market value and assessed at the percentage of

value required by state law. Furthermore, there was absolutely no showing that any railroad property was valued other than as required by state law. Railroad property was, however, equalized with commercial and industrial property in Kansas as required by the 4-R Act. See 49 U.S.C. §11503(b)(1) (Petitoners' Appendix D, 34a-35a). The equalization of railroad property with commercial and industrial property was ordered by the United States District Court for the District of Kansas.

Second, petitioners falsely characterize as a "special arrangement" and a "special deal" the railroad consent decrees. As stated above, what happened in the relevant years is that several railroads operating in Kansas sued the state in the United States District Court for the District of Kansas, under the provisions of the 4-R Act. Eventually, the railroad lawsuits were settled by the entry of consent decrees approved by the court. The consent decrees fashioned a settlement that was *appreciably more favorable* to the State of Kansas than what other states had achieved as a result of fully litigating the same claims. See, *e.g.*, *Trailer Train Co. v. Leuenberger*, *aff'd Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied sub dom. Boehm v. Trailer Train Co.*, 490 U.S. 1066 (1989) (rail cars entitled to total property tax exemption under the provisions of the 4-R Act when state property tax exemptions apply to three-fourths of the commercial and industrial property in the state and do not apply to rail cars). See also *Ogilvie v. State Board of Equalization*, 492 F. Supp. 446 (D. N.D. 1980), *aff'd* 657 F.2d 204 (8th Cir. 1981) *cert. denied* 454 U.S. 1086 (1981); *Department of Revenue v. Trailer Train*, 830 F.2d 1567 (11th Cir. 1987); *Burlington Northern Railroad Co. v. Blair*, 584 F. Supp. 1229 (S.D. Iowa 1984), *aff'd in part, remanded in part* 766 F.2d 1222 (8th Cir. 1985); and *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468 (8th Cir. 1983).[1]

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[1] All of these cases were decided prior to this Court's decision in *Oregon Revenue Dept. v. ACF Industries, Inc.*, 510 U.S. ___, 114 S. Ct. 843, 127 L. Ed. 2d 165 (1994), and had found state property tax exemptions granted to commercial and industrial property violative of the 4-R Act when not granted to rail transportation property.

Third, petitioners malign the State Board of Tax Appeals' and the court below's supposed lack of understanding of the 4-R Act, as applied to the railroad litigants; however, as indicated by their written decisions (Petitioners' Appendices A, 1a-21a, and B, 22a-32a), both the Board and the court below had a full understanding of the requirements of the 4-R Act.

REASONS FOR DENYING THE WRIT

I. PROPERTY TAX RELIEF FOR INTERSTATE NATURAL GAS PIPELINES IS THE PREROGATIVE OF CONGRESS.

Interstate natural gas pipelines, operating in Kansas, are attempting to obtain, under the state's equal protection clause,[2] the same property tax relief given to the state's railroads under the 4-R Act.

In recent years, several bills have been introduced in Congress to provide property tax relief for interstate natural gas pipelines. In 1984, Senator Ford (D-KY) introduced S. 2932 to amend the Natural Gas Pipeline Safety Act of 1968, and the Hazardous Liquid Pipeline Safety Act of 1979, to provide property tax relief styled after the 4-R Act for interstate natural gas pipelines.[3] In 1987, Representative Hughes (D-NJ) introduced H.R. 2953,[4] and in 1989, Representative Larry Smith (D-FL) introduced H.R. 2378,[5] which were also designed to provide property tax relief styled after the 4-R Act for interstate natural gas pipelines. None of these efforts succeeded. To date, Congress has failed to enact property tax relief for interstate natural gas pipelines.

Kansas pipelines and Kansas railroads are defined as pub-

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[2] Kan. Const., art. 11, § 1 (1985) (Petitioners' Appendix D, 36a-38a). Additionally, petitioners claim a violation under the Equal Protection Clause of the United States Constitution. The Kansas Supreme Court has held that the uniform and equal rate of assessment and taxation provision of art. 11, § 1 of the Kansas Constitution is, in principle and effect, substantially identical to the principle of equality embodied in the Equal Protection Clause of the United States Constitution. *State ex rel. Tomasic v. City of Kansas City*, 237 Kan. 572, 584, 701 P.2d 1314, 1326 (1985).

[3] 130 Cong. Rec. 23324 (1984).

[4] 133 Cong. Rec. 6376 (July 15, 1987).

[5] 135 Cong. Rec. 1976 (May 16, 1989).

lic utilities and valued and taxed exactly alike under Kansas law. Kan. Stat. Ann. § 79-5a01 (Appendix A, 1a) and Kan. Stat. Ann. § 79-5a04 (Appendix B, 2a-3a). Public utilities are separately classified under the Kansas Constitution for property tax purposes and assessed at 30% of true market value. Kan. Const., art. 11, § 1 (1985) (Petitioners' Appendix D, 36a-38a). Commercial and industrial personal property is also separately classified under the Kansas Constitution and assessed at 20% of depreciated cost. The 4-R Act requires railroad property to be equalized with the true market value of commercial and industrial property; consequently, in 1990 and 1991, several Kansas railroads sued the state in the United States District Court for the District of Kansas to obtain the equalization of their property with the true market value of commercial and industrial property. Kansas conceded that the railroads were entitled to have their property equalized with the true market value of commercial and industrial property,[6] and consent decrees were entered into by the parties and approved by the court. The pipelines want the provisions of the consent decrees and, by implication, the provisions of the 4-R Act extended to them.

The court below rejected the pervasive disruption of Kansas' classification system advocated by petitioners. As stated by the court below, "[t]o buy [petitioners'] argument, we would have to conclude the 4-R Act, in essence, eliminated the public utility subclass of property and transferred the same to the commercial and industrial subclass." See Petitioners' Appendix A, 18a. Such a holding would destroy Kansas' classification system, at least as applied to public utilities.

This Court has been hesitant to extend the provisions of a federal statute that preempts a state's taxation authority beyond its evident scope. *Oregon Revenue Dept. v. ACF Industries, Inc.*, 510 U.S. ___, ___, 114 S. Ct. 843, 850-851, 127 L. Ed. 2d 165, 176 (1994). The court below recognized that the

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[6] To equalize a railroad's property, which is valued at true market value for assessment purposes, with commercial and industrial property, which is valued at depreciated cost for assessment purposes, it is necessary to reduce the assessment percentage applied to the railroad's value.

4-R Act preempted Kansas' classification of railroads as public utilities and required their property to be equalized with commercial and industrial property;[7] however, consistent with the preemption principles articulated by this Court, the Act's preemptive effect was limited to the railroads, thereby causing minimal interference with the state's classification system. See Petitioner's Appendix A, 14a-15a.

This Court has stated that "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Generally, the Court will not conclude that Congress legislated the ouster of a state statute or constitutional provision in the absence of an unambiguous congressional mandate to that effect. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-147 (1963). "Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." *Bethlehem Steel Co. v. New York Labor Relations Bd.*, 330 U.S. 767, 780 (1947) (Frankfurter, J., concurring). See also *Cipollone v. Liggett*, 505 U.S. ___, ___, 112 S. Ct. 2608, 2626, 120 L. Ed. 2d 407, 432-433 (1992) (Blackmun, J., concurring).

Petitioners, in this litigation, are attempting to obtain from the judiciary what they have been unable to obtain from Congress. It is the prerogative of Congress, under its commerce powers, to determine whether interstate natural gas pipeline should be taxed like railroads. The court below properly rejected petitioners' attempt to obtain tax relief through the abrogation of the Kansas property tax classification sys-

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[7] Early in the litigation spawned by the 4-R Act, it was held that the 4-R Act abrogates incompatible state classification systems. See *State of Tenn. v. Louisville & N. R. Co.*, 478 F. Supp. 199, 206 (M.D. Tenn. 1979), *aff'd* 652 F.2d 59 (6th Cir. 1981), *cert. denied* 454 U.S. 834 (1981) (Congress' effort to revitalize the railroad industry by implementing the 4-R Act overrides the State's interest in maintaining a property tax classification system); and *Trailer Train Co. v. State Bd. of Equalization*, 511 F. Supp. 553 (N.D. Calif. 1981), *modified* 697 F.2d 860 (9th Cir. 1983), *cert. denied* 464 U.S. 846 (1983) (the power of the state to discriminate against rail transportation property for purposes of applying tax rates was preempted by the passage of the 4-R Act in 1976).

tem and, for that reason, this Court should deny the petition for writ of certiorari.

II. THE DECISION OF THE KANSAS SUPREME COURT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER STATE COURT OF LAST RESORT.

Petitioners argue that the decision of the court below conflicts with the decision of the Nebraska Supreme Court in *Northern Natural Gas Co. v. State Board of Equalization & Assessment*, 232 Neb. 806, 443 N.W.2d 249, *cert. denied* 493 U.S. 1078 (1990) ("*Northern Natural Gas*"). While it is true that the Nebraska Supreme Court required pipeline property to be equalized with railroad property, a careful analysis of the case reveals that pipeline property was required to be equalized with railroad property under the Nebraska Constitution regardless of the ramifications of the 4-R Act. There is no conflict between the decision of the court below and the decision of the Nebraska Supreme Court in *Northern Natural Gas*. As a leading commentator in the area of state and local taxation has stated:

> It is also apparent that the railroads and carlines themselves, had they anticipated the court's opinion in *Northern Natural Gas*, would have had no need to pursue their remedies in Federal court under the 4-R Act because identical relief was available in state court, to wit, equalization with most other commercial and industrial property in the state. Not only does this reveal the irrelevance of the 4-R Act to the court's decision in *Northern Natural Gas*, it also indicates that even if the 4-R Act were repealed or modified, the pipelines, railroads, and carlines would be in precisely the same position in Nebraska as they are today. Indeed, the irony of the suggestion that the 4-R Act is somehow to "blame" for the predicament in which the *Northern Natural Gas* opinion has placed the state of Nebraska is that if the *Northern Natural Gas* case

> reflected the law in most states, there never would have been any need for the 4-R Act. Walter Hellerstein, *Equal Protection Run Amok?: An Analysis of the Nebraska Supreme Court's Decision in the Northern Natural Gas Case*, Tax Notes, November 20, 1989, p. 1000.

In short, Nebraska has a single class of property for assessment purposes,[8] and all property within such class is entitled to uniform and equal tax treatment under state law.[9] Kansas, by contrast, has classified property for assessment purposes and only requires uniform and equal tax treatment within constitutionally prescribed subclasses. Kan. Const., art. 11, § 1 (1985) (Petitioners' Appendix D, 36a-38a).[10] Under the Kansas classification system, public utility property constitutes one subclass of property, and commercial and industrial property constitutes another subclass of property. Under the 4-R Act, rail transportation property is required to be equalized with commercial and industrial property. See 49 U.S.C. § 11503(b)(1) (Petitioners' Appendix D, 34a-35a) (a state may not assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property). The 4-R Act defines "commercial and industrial property" to mean "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commer-

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[8] Neb. Const., art. 8, § 1 (1984) (Appendix C, 4a-5a).

[9] The Nebraska legislature has authority to separately classify motor vehicles, trucks, trailers, semitrailers, truck-tractors, agricultural land, horticultural land and livestock. Neb. Const., art. 8, § 1 (1984) (Appendix C, 4a-5a).

[10] This Court has long held that state property tax classification systems based on reasonable distinctions between the classes are constitutional. See, *e.g.*, *Nordlinger v. Hahn*, 505 U.S. ___, ___, 112 S. Ct. 2326, 2332, 120 L. Ed. 2d 1, 13 (1992) (states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation); and *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983) (legislatures have especially broad latitude in creating classifications and distinctions in tax statutes); See also *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-360 (1973); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527-528 (1959); and *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 87-88 (1940).

cial or industrial use and subject to a property tax levy. See 49 U.S.C. § 11503(a)(4) (Petitioners' Appendix D, 34a-35a). Therefore, in order to comply with the provisions of the 4-R Act requiring rail transportation property to be equalized with commercial and industrial property, Kansas, unlike Nebraska, found it necessary to cross subclass lines for equalization purposes. This fundamental distinction, recognized by the court below (Petitioners' Appendix A, 15a), sets this case apart from the Nebraska case and explains any perceived inconsistency.

The decision of the court below is consistent with the decisions of the Tennessee Supreme Court in *Federal Express Corp. v. Tennessee State Board of Equalization*, 717 S.W.2d 873 (Tenn. 1986) ("*Federal Express*") and of the Alabama Court of Civil Appeals in *State v. Colonial Pipeline Co.*, 471 So.2d 408 (Ala. Civ. App. 1984), *appeal denied* 474 U.S. 936 (1985) ("*Colonial Pipeline*"). The court below noted both *Federal Express* and *Colonial Pipeline* and relied on them in its analysis. See Petitioners' Appendix A, 15a-18a.

In *Federal Express*, the Tennessee Supreme Court considered a taxpayer's challenge to the assessment of its property at the 55% rate applicable to public utility property rather than the 30% rate applicable to commercial and industrial property. In rejecting the contention that the Equal Protection Clause forbade the state from assessing the taxpayer's property at the rate applicable to utility property while assessing railroad property at the lower rate applicable to commercial and industrial property, the court reasoned that the 4-R Act preempted the state's classification of railroads and provided that they should be taxed as other commercial and industrial property is taxed, leaving in effect the state's tax treatment of other public utilities.

In *Colonial Pipeline*, the Alabama Court of Civil Appeals considered a pipeline's challenge to the assessment of its property at the highest applicable rate that was prescribed for public utility property. As in this case, the property of railroads had been assessed at a lower rate than the rate applicable to the pipeline's property because of the requirements of the 4-

R Act. In its opinion rejecting the pipeline's objection to its assessment at the public utility rate, the court dismissed the suggestion that disparate treatment of pipelines, on the one hand, and railroads, on the other, would violate the Equal Protection Clause even though the property of the pipelines and railroads was included within the same property tax classification category under state law. The court, citing the supremacy of federal law, found that the 4-R Act preempted the state classification system as applied to railroads but left it in place as applied to pipelines.

Federal Express and *Colonial Pipeline* hold that the 4-R Act has created a classification scheme that is binding on the states. So long as that classification scheme has a rational basis,[11] no substantial equal protection attack can be leveled against the classification. And this is so, regardless of how the states might have originally classified the property in question.

More recently, the Utah Supreme Court in *Kennecott Corporation v. Utah State Tax Com'n*, 858 P.2d 1381 (Utah 1993) ("*Kennecott*"), rejected the argument that state assessed taxpayers are entitled to the same tax treatment under the Equal Protection Clause as accorded to "similarly situated" state assessed railroads under the 4-R Act (the same argument made by petitioners). The court stated that to establish an equal protection violation, a party must demonstrate that the law creates a certain class of persons who are similarly situated and must show that the law is applied differently to members of the class without a reasonably related legitimate government purpose. The court found the 4-R Act was a distinguishing factor in determining that the railroads and Kennecott were not similarly situated.

The Alabama, Tennessee and Utah courts, like the court below, were required to make a classification analysis in deciding cases raising similar facts to the facts in this case be-

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[11] Clearly, the rational basis for the 4-R Act is the revitalization of the railway system of the United States. *Oregon Revenue Dept. v. ACF Industries, Inc.*, 510 U.S. ___, ___, 114 S. Ct. 843, 846, 127 L. Ed. 2d 165, 171 (1994).

cause each state had separately classified public utility property in a way that conflicted with the requirements of the 4-R Act. Nebraska, on the other hand, had not separately classified public utility property and was required to equalize railroad property with commercial and industrial property under state law. Thus, petitioners are unable to show the Court a single case where the facts and applicable law are analogous in which the decision conflicts with the decision of the court below. For that reason, it would be inappropriate to grant the petition for certiorari.

III. THE DECISION OF THE KANSAS SUPREME COURT DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *ALLEGHENY PITTSBURGH COAL CO. v. COUNTY COMMISSION*, 488 U.S. 336 (1989).

This Court, in *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989) ("*Allegheny Pittsburgh*"), prohibited the practice of a West Virginia county tax assessor of assessing recently purchased property at its purchase price, while making only minor adjustments in the assessments of property that had not recently been sold, in violation of West Virginia's constitutional provision requiring all property to be taxed at a uniform rate statewide according to its current market value. *Allegheny Pittsburgh* was not a 4-R case and had nothing to do with a state's compliance with the provisions of a federal law.

In *Nordlinger v. Hahn*, 505 U.S. ___, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992), this Court upheld California's constitutional provision requiring an "acquisition value" system of taxation (Proposition 13), finding it rationally based. 112 S. Ct. at 2335-2336, 120 L. Ed. 2d at 17. In railroad tax terminology, as will be explained below, the practice of the West Virginia county tax assessor, prohibited by this Court in *Allegheny Pittsburgh*, would be characterized as *de facto* discrimination, whereas the California "acquisition value" system of taxation, upheld by this Court in *Nordlinger*, would be characterized as *de jure* discrimination.

De jure discrimination arises when a taxation system requires similar property to be assessed at different rates. In contrast, *de facto* tax discrimination arises when a taxation system does not establish different rates of assessment, but through its operation nonetheless results in discrimination. See *General American Transp. Corp. v. Com. of Kentucky*, 791 F.2d 38, 40 (6th Cir. 1986); *Atchison, Topeka & Santa Fe Ry. v. State of Ariz.*, 559 F. Supp. 1237, 1243 (D. Ariz. 1983); *Clinchfield Railroad v. Lynch*, 527 F. Supp. 784, 785 n. 5 (E.D. N.C. 1981), *aff'd* 700 F.2d 126 (4th Cir. 1983); *Burlington Northern R. Co. v. Lennen*, 715 F.2d 494, 497 (10th Cir. 1983); *Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 552 F. Supp. 1031, 1039 (D. Kan. 1982), *aff'd in part, rev'd in part* 732 F.2d 1495 (10th Cir. 1984); and *ACF Industries, Inc. v. State of Ariz.*, 561 F. Supp. 595, 599 (D. Ariz. 1982), *aff'd* 714 F.2d 93 (9th Cir. 1983).

Unlike the situation in *Allegheny Pittsburgh*, the State of Kansas has not engaged in *de facto* property tax discrimination against either the railroads or the pipelines. The pipelines have stipulated that their property is valued at true market value as required by Kansas law. Just as significantly, there has been no showing that railroad property has not been valued at true market value.

Petitioners argue that the classification system of the Kansas Constitution is fully consistent with the mandate of the 4-R Act prohibiting discriminatory state tax treatment of railroads. See Petition, pp. 16-17. Petitioners' argument, however, is totally fallacious. The Kansas classification system prescribes a higher assessment percentage of value for the public utility subclass of property, which includes railroad property, than it prescribes for the commercial and industrial subclass of property. Moreover, commercial and industrial property is not valued at true market value like public utility property, but is assessed based on depreciated cost. Kan. Const., art. 11, § 1 (Petitioners' Appendix D, 36a-38a). The railroad consent decrees recognized this fact, and in order to comply with the provisions of the 4-R Act, ordered state officials to assess rail-

road property at the same percentage of value as applied to the true market value of commercial and industrial property.

The railroad consent decrees also exempted 80% of the railroad's personal property from taxation in Kansas. The railroads had argued that because Kansas had exempted 80% of its personal property from taxation, subsection (b)(4) of the 4-R Act had been violated. This argument was not novel and had been successfully raised by various railroads in 4-R lawsuits around the country. See, *e.g.*, *Ogilvie v. State Bd. of Equalization*, 492 F. Supp. 446, 455 (D. N.D. 1980), *aff'd* 657 F.2d 204 (8th Cir.), *cert. denied* 454 U.S. 1086 (1981) ("[subsection (b)(4)] requires if personal property of locally assessed business is to be exempt from ad valorem taxation the personal property of railroads must also be exempt"); *Burlington Northern R. Co. v. Blair*, 584 F. Supp. 1229 (D. Iowa 1984), *aff'd in part, remanded in part* 766 F.2d 1222 (8th Cir. 1988) ("illogical to make irrelevant the statutory exemption which has the most discriminatory effect on the taxation of [the railroad's] property"); and *Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 417 (8th Cir. 1988), *cert. denied sub nom. Boehm v. Trailer Train Co.*, 490 U.S. 1066 (1989) ("tax exemptions are to be considered in determining whether there has been discriminatory treatment under [subsection (b)(4)]"). See also cases collected on p. 13 n. 4 of the petition.[12]

Thus, the consent decrees did nothing more than implement the provisions of the 4-R Act as applied to railroads operating in Kansas. Kansas' classification of property for property tax purposes was disrupted only to the extent necessary to comply with federal law. Petitioners have failed to show a legally sufficient reason why Kansas' property tax classification system should be further disrupted.

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[12] This Court's decision in January, 1994, in *Oregon Revenue Dept. v. ACF Industries, Inc.*, 510 U.S. ___, 114 S. Ct. 843, 127 L. Ed. 2d 165 (1994), holding that subsection (b)(4) of the 4-R Act does not limit a states ability to exempt nonrailroad property from taxation obviously makes the foregoing cases obsolete. Nonetheless, they definitely represented the state of the law at the time the consent decrees were approved by the federal court in this case.

CONCLUSION

In this case, the court below decided no important questions of federal law which in any way conflict with applicable decisions of this Court. Nor, did it decide a federal question in a way that conflicts with the decision of another court of last resort or of a United States Court of Appeals. The court below merely applied long-recognized principles of federal preemption, recognized the purpose of the 4-R Act, and limited its preemptive effect to railroads for whose benefit it was enacted. For these reasons, it is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A

Kan. Stat. Ann. § 79-5a01.

(a) As used in this act, the terms "public utility" or "public utilities" shall mean every individual, company, corporation, association of persons, lessees or receivers that now or hereafter are in control, manage or operate a business of:

(1) A railroad or railroad corporation if such railroad or railroad corporation owns or holds, by deed or other instrument, an interest in right-of-way, track, franchise, roadbed or trackage in this state;

(2) transmitting to, from, through or in this state telegraphic messages;

(3) transmitting to, from, through or in this state telephonic messages;

(4) transporting or distributing to, from, through or in this state natural gas, oil or other commodities in pipes or pipelines, or engaging primarily in the business of storing natural gas in an underground formation;

(5) generating, conducting or distributing to, from, through or in this state electric power;

(6) transmitting to, from, through or in this state water if for profit and subject to regulation of the state corporation commission;

(7) transporting to, from, through or in this state cargo or passengers by means of any vessel or boat used in navigating any of the navigable watercourses within or bordering upon this state.

(b) The terms "public utility" or "public utilities" shall not include: (1) Rural water districts established under the laws of the state of Kansas; or (2) any individual, company, corporation, association of persons, lessee or receiver owning or operating an oil or natural gas production gathering line which is situated within one county in this state and does not cross any state boundary line; or (3) any individual, company, corporation, association of persons, lessee or receiver owning any vessel or boat operated upon the surface of any manmade waterway located entirely within one county in this state.

APPENDIX B

Kan. Stat. Ann. § 79-5a04.

The director of property valuation shall annually determine the fair market value of public utility property, both real and personal, tangible and intangible, of every public utility as defined in subsection (a) of K.S.A. 79-5a01 and amendments thereto.

As used in this section, "fair market value" means the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion. For the purposes of this definition, it shall be assumed that consummation of a sale occurs as of January 1.

The division of property valuation in determining the fair market value of public utility property shall, where practicable, determine the unit valuation, allocated to Kansas, and in doing so shall use generally accepted appraisal procedures developed through the appraisal process and may consider, including but not by way of exclusion, the following factors:

(a) Original cost.

(b) Original cost less depreciation or reproduction cost less depreciation, or both, or replacement cost new less depreciation, except that where either method is used proper allowance and deduction shall be made for functional or economic obsolescence and for operation of nonprofitable facilities which necessitate regulatory body approval to eliminate.

(c) The market or actual value of all outstanding capital stock and debt.

(d) The utility operating income, capitalized in the manner and at such rate or rates as shall be just and reasonable.

(e) Such other information or evidence as to value as may be obtained that will enable the property valuation department to determine the fair market value of the property of such public utility.

The fair market value of affiliated properties separately assessed, or the nonoperating properties of such companies, or both, shall be ascertained and determined as nearly as pos-

sible and deducted from the total unit value of the properties of such companies if such properties are included in the unit value. Except for the property of any entity enumerated in subsection (b) of K.S.A. 79-5a01 and amendments thereto, and insofar as it is practicable to do so, the same method of evaluating the properties of companies separately assessed or nonoperating properties, or both, shall be used as was used in determining the unit value of such companies. All property of any entity enumerated in subsection (b) of K.S.A. 79-5a01 and amendments thereto, shall be valued by the county or district appraiser in the same manner as provided by law for the valuation of the same type or class of property in the county.

APPENDIX C
Nebraska Constitution (1984)

Art. 8, § 1.

The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct. Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, except that the Legislature may provide for a different method of taxing motor vehicles and may also establish a separate class of motor vehicles consisting of those owned and held for resale by motor vehicle dealers which shall be taxed in the manner and to the extent as provided by the Legislature and may also establish a separate class for trucks, trailers, semitrailers, truck-tractors, or combinations thereof, consisting of those owned by residents and nonresidents of this state, and operating in interstate commerce, and may provide reciprocal and proportionate taxation of such vehicles; *Provided*, that such tax proceeds from motor vehicles taxed in each county shall be allocated to the state, counties, townships, cities, villages, and school districts of such county in the same proportion that the levy of each bears to the total levy of said county on personal tangible property. The Legislature may enact laws to provide that the value of land actively devoted to agricultural or horticultural use shall, for property tax purposes, be that value which such land has for agricultural or horticultural use without regard to any value which such land might have for other purposes or uses, and prescribe standards and methods for the determination of the value of real or other tangible property at uniform and proportionate values. The Legislature may provide that agricultural land and horticultural land used solely for agricultural or horticultural purposes shall constitute a separate and distinct class of property for purposes of taxation. Taxes uniform as to class of property or the ownership or use thereof may be levied by valuation or otherwise upon classes of intangible property as the Legislature may determine, and such intangible property held in trust or otherwise for the purpose of funding pension, profit-sharing, or other employee benefit

plans as defined by the Legislature may be declared to be exempt from taxation. Taxes, other than property taxes, may be authorized by law. Existing revenue laws shall continue in effect until changed by the Legislature. The Legislature may provide that livestock shall constitute a separate and distinct class of property for purposes of taxation and may further provide for reciprocal and proportionate taxation of livestock in this state for only part of a year.

MOTION FILED
JUL 13 1994

(3)

No. 93-1995

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ANR PIPELINE COMPANY, *et al.*,
Petitioners,
v.
DIRECTOR OF PROPERTY VALUATION,
DEPARTMENT OF REVENUE OF THE STATE OF KANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR WESTERN RESOURCES, INC., UTILICORP UNITED INC., KANSAS CITY POWER & LIGHT COMPANY, AND SPRINT COMMUNICATIONS CO., L.P., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

---

MOTION OF WESTERN RESOURCES, INC., UTILICORP UNITED INC., KANSAS CITY POWER & LIGHT COMPANY, AND SPRINT COMMUNICATIONS CO., L.P., FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

Western Resources, Inc., Utilicorp United Inc., Kansas City Power & Light Company, and Sprint Communications Co., L.P. hereby move pursuant to Rule 37.2 for leave to file a brief as *Amici Curiae* supporting the Petitioners in this case. A motion is necessary because Respondent, Director of Property Valuation, Department of Revenue of the State of Kansas, has refused to consent to the filing of the brief.

The Kansas Supreme Court held below that state constitutional mandates of uniform and equal property tax treatment, as well as the federal constitutional guarantee of equal protection, were not violated by substantial un-

disputed disparities in treatment [1] within the class of public utilities. The court below held that the preemptive effect of the Railroad Revitalization and Regulatory Reform Act of 1976 [2] mandated these disparities. The state court holding directly affects the interest of all public utilities operating in the State of Kansas, and has implications beyond Kansas to the extent that unfair taxation within Kansas increases the cost of utility services throughout the nation. Movants are public utilities that were at all material times classified along with railroads and pipelines as "public utilities" for the purpose of Kansas property taxation, and are therefore directly affected by the holding of the court.

Movant Western Resources, Inc. with its operating groups, Kansas Gas and Electric Company, KPL and Gas Service Co., is a combination natural gas and electric utility serving customers in Kansas and Oklahoma. The Company's corporate offices are in Topeka, Kansas, and it maintains operation headquarters in both Topeka and Wichita.

Movant Kansas City Power & Light Company is an electric utility that generates and distributes electricity to about 419,000 customers in a 4,700 square mile area located in 23 counties in western Missouri and eastern Kansas.

Movant Utilicorp United Inc. is an electric and gas utility operating in nine states (including Kansas) and one Canadian province. The company is headquartered in Kansas City.

Movant Sprint Communications Co., L.P. is a multi-state/multi-national telecommunications company providing long-distance telephone service in Kansas and across

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[1] The extent of these disparities and the undisputed nature thereof is discussed in the proposed Brief of Amici Curiae at note 2.

[2] Pub. L. No. 94-210, 90 Stat. 54 (1976), currently codified at 49 U.S.C. § 11503 (hereinafter "the 4-R Act").

the nation. The Company was founded in Abilene, Kansas, and maintains its world headquarters in Westwood, Kansas. In addition to serving a substantial customer base in Kansas, Sprint's long-distance division monitors its nation-wide traffic from National Operations Control Center in Overland Park, Kansas.

When considered collectively, movants, Western Resources, Inc., Kansas City Power & Light Company, and Utilicorp United Inc. provide gas and/or electric service for the majority of the industrial and residential consumers in Kansas. Movant, Sprint Communications Co., L.P. is one of the major telecommunications companies present in and serving the State of Kansas. By virtue of their long familiarity and involvement in the assessment and taxation of public utilities in Kansas, movants can assist the Court in understanding the vital importance of the issues presented by the Petitioners.

Since territorial days, Kansas has championed the uniform and equal treatment of taxpayers for property tax purposes, and as recently as 1986 the people of Kansas reaffirmed by constitutional amendment the importance of uniformity and equality within the class of public utilities. The Kansas Supreme Court's holding that federal law requires a dramatic departure from these long established principles is in direct conflict with a recent decision of this Court. Moreover, disparities within the class of public utilities resulting from the state court decision present a clear opportunity to endorse the continued vitality of this Court's decision in *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989). Movants have a direct interest in the elimination of discrimination in property taxation among public utilities in Kansas, and in the restoration of an appropriate accommodation of state and federal interests on this important issue.

For these reasons, movants ask leave to file the accompanying brief.

Respectfully submitted,

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Dated July 13, 1994

QUESTIONS PRESENTED

This brief *amici curiae* addresses the following questions:

(1) Whether the Kansas Supreme Court decision conflicts with this Court's decision in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 114 S.Ct. 843 (1994), in its failure to acknowledge that the State's discriminatory property tax treatment had no basis in federal law, and in its holding of preemptive effect of federal law beyond, and contrary to, this Court's recent holding?

(2) Whether *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989), continues to prohibit systematic discriminatory property tax treatment where that unequal treatment does not arise from any state purpose, but rather stems from an incorrect interpretation of a federal statute?

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IN THE

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Petitioners,

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DEPARTMENT OF REVENUE OF THE STATE OF KANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

---

BRIEF FOR WESTERN RESOURCES, INC., UTILICORP UNITED INC., KANSAS CITY POWER & LIGHT COMPANY, AND SPRINT COMMUNICATIONS CO., L.P., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici, Western Resources, Inc., Utilicorp United Inc., and Kansas City Power & Light Company, are investor-owned gas and/or electric public utility companies that together serve the majority of industrial and residential consumers in Kansas. *Amicus* Sprint Communications Co., L.P. is a major multi-state/multi-national telecommunications company with its world headquarters in Kansas providing substantial long-distance services to customers in Kansas and across the nation. All four *Amici* were classified at all material times under the Kansas Constitution along with pipelines and railroads as

"public utilities" for property tax purposes, and are entitled by constitutional mandate in Kansas to uniform and equal treatment within their class. Accordingly, *Amici* are similarly situated public utility taxpayers and entitled to equal property tax treatment by virtue of the equal protection clause of the U.S. Constitution.

The Petition seeks review of a Kansas Supreme Court decision that refused to remedy discrimination within the established class of public utilities in Kansas. The resulting disparities within the class of public utilities in Kansas are of no less concern to *Amici* than to the Petitioners. *Amici* file this brief to respectfully urge the Court to grant certiorari to review the Kansas Supreme Court decision, which fails to consider a recent decision of this Court, fails to apply the proper equal protection analysis, and upholds discrimination in property tax treatment among public utilities in Kansas based on an erroneous application of federal statutory and constitutional law.

SUMMARY OF ARGUMENT

1. This Court should grant the Petition For Writ Of Certiorari because the Kansas Supreme Court's decision is in direct conflict with this Court's decision in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 114 S.Ct. 843 (1994), *rev'g*, 961 F.2d 813 (9th Cir. 1992). The disparities within the class of public utilities in Kansas are the result of railroad property tax settlements, which, in light of *ACF Industries*, have absolutely no justification in state or federal law. The Kansas Supreme Court ignored the extent to which this Court undermined the purported basis for the railroad settlements in Kansas by its holding in *ACF Industries*. In addition, the court below erroneously construed federal law as having a preemptive effect beyond and contrary to this Court's interpretation of the Railroad Revitalization and Regulatory Reform Act of 1976.[1] The discriminatory acts of Kansas

[1] Pub. L. No. 94-210, 90 Stat. 54 (1976), currently codified at 49 U.S.C. § 11503 (hereinafter "the 4-R Act").

taxing authorities, which result in inequities among public utility taxpayers in Kansas, cannot be justified after this Court's decision in *ACF Industries*. These clear conflicts between the decisions on important issues of federal law justify review by this Court, or, at a minimum, summary reversal, vacatur, and remand for consideration in light of *ACF Industries*.

2. The second basis for granting the Petition is that it presents an important question of federal constitutional law that is unsettled in the courts below. The Kansas Supreme Court acknowledged that state law required a uniform and equal basis for valuation and rate of taxation among members of the same class. That court also implicitly acknowledged that the railroad settlements destroyed uniform property tax treatment among public utilities. The court justified the discriminatory tax treatment received by the Petitioners, however, by the mistaken conclusion that to do so was required by the 4-R Act. In light of this Court's recent decision in *ACF Industries*, which removes all rationale for upholding the state actions that resulted in Petitioners receiving discriminatory treatment, that conclusion is devoid of support. Accordingly, this case cries out for application of the equal protection clause of the Fourteenth Amendment, and presents an opportunity for this Court to address whether *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989) continues as a limitation on a state's power to discriminate in matters of property taxation.

The decision below is inescapably based on erroneous construction and application of federal statutory and constitutional law. The broad sweeping preemption of long-established principles of state constitutional law simply cannot be squared with *ACF Industries*. The railroad settlements are devoid of any legal basis after *ACF Industries*. The resulting unjustified discrimination is precisely that which cannot survive application of this

Court's equal protection analysis in *Allegheny*. This case presents compelling reasons for review by this Court.

ARGUMENT

I. THE KANSAS SUPREME COURT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN *ACF INDUSTRIES*

This Court traditionally has granted certiorari to review decisions of state courts addressing federal questions that conflict with decisions of this Court. *See, e.g., Dolan v. City of Tigard*, 62 U.S.L.W. 4576 (1994). For example, in cases that touch the accommodation of state and federal interests under the U.S. Constitution, *see, e.g., Oregon Waste Systems, Inc. v. Oregon Dept. of Environmental Quality*, 114 S.Ct. 1345 (1994), or when a state decision addresses preemption of state law by federal statute or treaty, *see, e.g., Hawaiian Airlines, Inc. v. Norris*, 62 U.S.L.W. 4537 (1994); *American Dredging Co. v. Miller*, 113 S.Ct. 1840 (1994), this Court has often granted certiorari.

It is well settled that accommodation of state and federal interests in local property taxation of railroads encompasses important federal questions that command this Court's attention. *See, e.g., Central Railroad Co. of Pennsylvania v. Pennsylvania*, 370 U.S. 607 (1962); *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987). Recently this Court reviewed a state decision that addressed the preemptive scope of the 4-R Act and the accommodation of state interests in railroad taxation. *Department of Revenue of Oregon v. ACF Industries, Inc.*, 114 S.Ct. 843 (1994), *rev'g*, 961 F.2d 813 (9th Cir. 1992).

State court decisions reflect growing confusion about the inherent tensions and the appropriate accommodation of interests among state power to tax, federal interests manifest in the 4-R Act, and the constitutional rights of

taxpayers. *Compare Northern Natural Gas Co. v. State Board of Equalization & Assessment*, 443 N.W. 2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990) with *Appeal of ANR Pipeline Co.*, 254 Kan. 534, 866 P.2d 1060 (1994); *see also, State v. Colonial Pipeline Co.*, 471 So.2d 408 (Ala. Civ. App. 1984); *Federal Express Corp. v. Tennessee State Bd. of Equalization*, 717 S.W.2d 873 (Tenn. 1986); *Kennecott Corp. v. Utah State Tax Comm'n*, 858 P.2d 1381 (Utah Ct. App. 1993). As the paramount expounder of federal law of national significance, this Court should assure that *ACF Industries* is followed, clarifying where necessary its application and constitutional ramifications.

Amici urge the Court to grant certiorari because the decision of the Kansas Supreme Court is in substantial conflict with this Court's decision in *ACF Industries* on two important federal questions. First, the Kansas Court wholly failed to appreciate that this Court undermined any legal basis for the railroad property tax settlements in Kansas. Second, the Kansas Court interpreted the 4-R Act to have preemptive effect beyond, and contrary to, this Court's construction of that Act.

It is not clear whether the Kansas Court had an adequate opportunity to analyze and apply *ACF Industries*. Although this Court's decision was issued three days after the decision of the Kansas Supreme Court, and was cited in Petitioners' Motion for Rehearing, the record does not indicate how or even whether the Kansas Court reconciled its holding with this Court's decision in *ACF Industries*. In the event that this Court is not inclined toward a comprehensive review of the decision below, certiorari should be granted for a summary reversal, vacatur and remand for reconsideration, in light of *ACF Industries*.

A. *ACF Industries* Undermined Any Legal Basis For The Railroad Settlements In Kansas.

The type of 4-R tax relief invalidated by *ACF Industries* is essentially identical to that received by railroads in Kansas. In the Kansas settlements, certain railroads and the state taxing authorities agreed to specific tax relief, including a deduction of 80% of railroad personal property prior to application of the constitutionally established assessment rate.[2] The settlements in Kansas granted the identical relief sought by, but denied to, the railroads by this Court in *ACF Industries*.

Kansas taxing authorities entered into the settlements after certain railroads brought suit alleging a violation of the 4-R Act. The Consent Decrees that formalize the settlements recite the fact that the railroad's property "did not qualify" for statutory exemptions afforded other taxpayers for grain, farm machinery, motor vehicle inventories, etc. Operating under the mistaken belief that this was a violation of the 4-R Act, the settlements granted to railroads that same aggregate exemption that was enjoyed by other commercial and industrial taxpayers, even though the railroads' personal property was technically and legally ineligible for such exemptions. Order Enjoining Assessment, Levy or Collection of Discriminatory Taxes, *Burlington Northern R.R. Co. v. Rolfs*, No. 89-4124-R (D. Kan. Aug. 11, 1989). *ACF Industries* clearly held that railroads were *not* entitled to the

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[2] As reflected in the decision of the court below, the settlements affected both real and personal property. Instead of the constitutional assessment rate of 30% for realty, the state agreed to give railroads a rate of 25% and 22.3% respectively for 1990 and 1991. The Petitioners' principal complaint, however, is that the state gave the railroads an 80% deduction of taxable personal property before application of the constitutional rate of 30%. This unprecedented tax break led to "vast disparities" between the railroads' tax burden and that placed on other public utilities, with the other public utilities at a level five times the effective rate for railroads. *See, Appeal of ANR Pipeline Co.*, 254 Kan. at 538.

benefit of such exemptions. 114 S. Ct. at 851. Accordingly, the principal impact of this Court's decision is to strip the acts of taxing authorities in Kansas of all legal justification in federal law. After *ACF Industries*, the acts of Kansas taxing authorities *vis a vis* Petitioners and *Amici* are arbitrary, discriminatory actions that cannot be justified by state or federal law.

ACF Industries and the decision below are in direct conflict. This Court held that railroads are *not* entitled to the benefit of property tax exemptions the state may grant to preferred property owners. In direct conflict, the Kansas Supreme Court upheld tax discrimination that resulted when the state granted that very exemption to certain members of the public utility class. In so ruling, the Kansas Supreme Court upset the proper accommodation of state and federal interests established by this Court's construction of the 4-R Act. Since this Court clearly has held that no such federal requirement exists, the Kansas Court should be free to address the existing state constraints upon property tax discrimination among public utilities *without* the interference created by that Court's incorrect determination of federal law.

B. The Kansas Supreme Court Construed The 4-R Act To Have Preemptive Effect Beyond And Contrary To This Court's Construction In *ACF Industries*.

In *ACF Industries*, this Court confined the preemptive effect of the 4-R Act to assessment rates *only*, and admonished against broadening the scope of any preemption beyond the "clear and manifest purpose of Congress", especially where the statute impinges upon or preempts the States' traditional powers. *ACF Industries*, 114 S. Ct. at 851. This Court always has required careful statutory analysis to assure that the extent of any preemption is appropriately limited consistent with congressional intent, the ultimate touchstone of the Court's inquiry. *Malone v. White Motor Corp.*, 435 U.S. 497,

504 (1978). Under the relevant test, there is no preemption absent a direct conflict between the state and federal law. *Id.* Indeed, as noted by this Court in *ACF Industries,* principles of federalism *compel* this view. 114 S. Ct. at 850.

The Kansas Supreme Court's decision presents no analysis to support the underpinning of its erroneous conclusion that "[t]here can be little doubt that this is a preemption. . . ." *Appeal of ANR Pipeline Co.,* 254 Kan. at 543. Of paramount significance, however, is the inescapable conclusion that the Kansas Court's holding that the 4-R Act requires a broad preemption of state classification systems and state uniform and equal mandates is in direct conflict with *this* Court's narrow preemption analysis in *ACF Industries.* The erroneous construction of the 4-R Act by the court below effectively shields state taxing authorities from state statutory or constitutional scrutiny. In fact, the decision is a license to perpetuate or extend the discrimination practiced among public utilities under the badge of an erroneous federal preemption.

This Court clearly held in *ACF Industries* that the strict construction and narrow preemptive effect of the 4-R Act urged by Petitioners below is required. Noting that the legislation "does not speak with any degree of particularity to the question of tax exemptions" this Court examined the prevalence of exemption schemes when the Act was drafted, and found through the Act's silence no congressional intent to disturb such exemptions.

The parallels between *ACF Industries* and this case are readily apparent. Similar to *ACF Industries,* "the statute does not speak with any degree of particularity to" the question of classification systems. Just as property tax exemptions are "an important aspect of state and local tax policy", so are property tax classification schemes. Just as exemptions were common when the Act was drafted, so were classification schemes. In fact, federal courts have consistently found no intent to inter-

fere with traditional classifications of property by the states. *See, e.g., ABF Freight System, Inc. v. Tax Div. of Arkansas Public Service Comm'n,* 787 F.2d 292, 295-96 (8th Cir. 1986). Had Congress intended to forbid the classification of railroads with other taxpayers it could have done so; the 4-R Act's silence as to classification schemes "reflects a determination to permit the States to leave [such classifications] in place." *ACF Industries,* 114 S. Ct. at 850.

The direct conflict between the two decisions is that this Court expressly held that the preemptive effect of the 4-R Act is limited to assessment rates, whereas the Kansas Supreme Court assumed a broad sweeping preemptive effect that undermined not only the Kansas classification systems but also the state constitutional mandate of uniformity and equality. The important federal question is the correct preemptive effect of the 4-R Act; state and federal interests cannot be accommodated appropriately in the absence of uniform construction of this important legislation. States should not be permitted to explain away inequalities in taxation on the basis of a federal preemption beyond and contrary to that acknowledged by this Court.

In any event, the broad preemptive effect erroneously concluded by the Kansas Supreme Court absent any preemption analysis is simply unwarranted. Not only has *ACF Industries* exposed and undermined any legal basis for the discriminatory actions of taxing authorities in Kansas, it has established a construction of the preemptive effect of the 4-R Act that clearly conflicts with that concluded by the Kansas Supreme Court. As the paramount expounder of federal law, this Court should assure that *ACF Industries* be followed, clarifying where necessary its application and constitutional ramifications. The Petition For Writ Of Certiorari should be granted for these reasons alone.

II. THE WRIT SHOULD BE GRANTED TO DETERMINE THE EXTENT TO WHICH *ALLEGHENY* REMAINS THE LAW OF THE LAND.

The present case presents an opportunity for the Court either to reaffirm the vitality of *Allegheny* as a continuing check on the power of state taxing officials, or to clarify the role of that case following *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992). Despite its express endorsement and distinction of *Allegheny*, the *Nordlinger* decision has cast doubt on the continuing vitality of *Allegheny*.[3] The holdings of these two cases have resulted in uncertainty.[4] As one state supreme court noted after *Nordlinger*, "the precise contours of the federal Equal Protection Clause in the context of state taxation are far from clear." *Jaksha v. Nebraska*, 241 Neb. 106, 486 N.W.2d 858, 864 (1992). The correct application of equal protection in the context of state taxation is an issue of national significance deserving this Court's attention. *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441 (1923).

In *Nordlinger*, this Court upheld California's constitutional property tax classification system, rejecting a challenge that California's system, which treated similar valued property in disparate ways, violated the Fourteenth Amendment's equal protection clause. To reach this conclusion, this Court distinguished *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989), where a taxpayer challenged a county assessor's taxation procedures that resulted in the taxpayer's property being

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[3] *See, e.g.*, M. Rawlins, *Taxation, Equal Protection, and Inquiry into the Purpose of a Law: Nordlinger v. Hahn and Allegheny Pittsburgh Coal Co. v. County Commission*, 1993 B.Y.U.L. Rev. 1001.

[4] *See, e.g.*, S. Mandarino, *Nordlinger to Allegheny: "This Town Ain't Big Enough for the Both of Us,"* 1993 Wis. L. Rev. 1195, 1223 ("By failing to overrule *Allegheny* directly, the Court has left equal protection doctrine in a state of disarray").

systematically assessed at significantly higher rates than similarly situated property.

Nordlinger distinguished *Allegheny* on the ground that in *Allegheny* the county assessor's unequal assessments were not made to further a legitimate state purpose served by the unequal assessment practices.[5] The Court noted that although "the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification[,] . . . this Court's review does require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger*, 112 S.Ct. at 2336, 2343. *Allegheny* presented a case "where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve" legitimate state purposes. *Id.* This case resulted, in large part because the West Virginia Constitution and laws required uniform taxation of similarly situated property.

Here, as in *Allegheny*, Petitioners challenged action by taxing authorities that systematically treated them less favorably than certain other similarly situated taxpayers. This dissimilar treatment was not justified on the basis of any legitimate state purpose. Like the actions in *Allegheny*, the challenged actions did not reflect the decision of state lawmakers that the unequal treatment was required to achieve some legitimate state goal. The discrimination, resulting from the railroad property tax settlements, resulted in certain railroads receiving tax exemptions and tax assessment treatment that was contrary to the clear state policy of Kansas that all public utilities were to be treated uniformly in matters of taxation. This public policy was endorsed and perpetuated in 1986, when Kansas amended its constitution to classify railroads

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[5] In *Nordlinger*, Justice Thomas and Justice Stevens both concluded that *Allegheny* could not be distinguished. 112 S.Ct. at 2336, 2343.

with all other public utilities and to require all members of the class to be taxed uniformly.

Nordlinger reaffirmed the requirement that discriminatory tax treatment can only be justified when a reviewing court can determine that a legitimate state purpose "may reasonably have been the purpose and policy" of the disparate treatment. 112 S.Ct. at 2334. In *Allegheny,* the actions of such a relevant decisionmaker that caused discriminatory treatment and were directly inconsistent with state policy were held to violate the equal protection clause of the Fourteenth Amendment. In the present case, where a state decisionmaker caused a systematic undervaluation of property that was required by state law to be treated uniformly with the Petitioners' property, the Kansas Supreme Court erroneously upheld the actions as not being a violation of the equal protection clause of the Fourteenth Amendment.

The decision of the Kansas Supreme Court to uphold the Kansas taxing official's actions in the face of state law that required uniform treatment was based on an erroneous interpretation of the 4-R Act. Because that rationale cannot control after *ACF Industries,* the facts of this case are precisely those that this Court confronted in *Allegheny.* Accordingly, the Court should grant review to affirm that *Allegheny* retains vitality, and that "palpably arbitrary" discrimination among taxpayers that are similarly situated and classified together for taxation, cannot pass constitutional muster.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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DEPARTMENT OF REVENUE OF THE STATE OF KANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Interstate Natural Gas Association of America ("INGAA") hereby respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari filed by ANR Pipeline Company, *et al.* in this case.[1]

INGAA respectfully submits that there are compelling reasons for the Court to grant this motion. INGAA is a national non-profit trade association[2] that represents virtually all of the major interstate natural gas pipeline companies operating in the United States, which account

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[1] The state of Kansas refused to consent to INGAA's filing of a brief as *amicus curiae*.

[2] INGAA has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

for over 90% of all natural gas transported and sold for resale in interstate commerce.[3] INGAA's members also include major Canadian interprovincial pipelines as well as British Gas, plc, Gaz de France, and Pemex-Gas y Petroquimica Basica.[4] As such, INGAA is vitally concerned about discriminatory taxation of interstate pipelines.

INGAA's members transport gas from the production area to the city gate for distribution and public consumption. In the course of this interstate transportation, natural gas pipelines can pass through numerous states. Many of these states tax pipelines in the discriminatory manner of the Kansas ad valorem tax challenged here. These discriminatory taxes on interstate pipelines are politically attractive to state legislators because they do not burden the local electorate. In Kansas, for example, more than 90% of the natural gas pipeline property is owned and operated by corporations based outside of Kansas. As a result, Kansas' discriminatory tax burden falls almost exclusively on non-residents.

Moreover, because property taxes are included in pipelines' rate bases, Kansas' (and other states') discriminatory tax assessments ultimately result in higher prices to millions of individual non-resident gas consumers. This adversely impacts the ability of natural gas to compete with other fuels, especially those fuels that are transported on railroads and thus receive the benefits of the Kansas-type property tax scheme. As a result, serious market distortions occur and energy consumers are deprived of the right to choose from suppliers competing on an unsubsidized basis.

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[3] INGAA's U.S. members are regulated by the Federal Energy Regulatory Commission pursuant to the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, and the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 *et seq.*

[4] A complete list of INGAA's members is included in the Appendix at pp. 1a-2a.

In the attached brief, INGAA endorses, but does not reprise, the arguments offered in the petition for certiorari. Instead, INGAA sets forth additional reasons for granting the petition. INGAA highlights the federalism and other concerns raised by the holding below that a federal statute designed to stop discrimination against rail property somehow disables application of state and federal constitutional anti-discrimination principles to *non*-rail property. INGAA also explains that discriminatory property taxation of interstate carriers is a serious and growing problem that is not limited to Kansas or natural gas pipelines. Indeed, more than a dozen other states—from Alabama to Wisconsin—already have adopted property taxation practices that unreasonably discriminate against natural gas pipelines and other interstate carriers. See, *infra* p. 8 & n.5. INGAA believes that its unique national perspective will assist the Court in addressing the important federal questions raised by the petition. Accordingly, INGAA respectfully requests that the Court grant INGAA leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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July 13, 1994

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QUESTION PRESENTED

Amicus will address the following question:

> Whether the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503, a federal statute that prohibits discriminatory state taxation of interstate railroad property, prevents application of both state tax uniformity laws and the Fourteenth Amendment guarantee of equal protection to *non*railroad property.

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

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BRIEF *AMICUS CURIAE* OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

INTRODUCTION AND STATEMENT

As this Court recently recognized, "[t]he power of state and local governments to impose ad valorem property taxes upon railroads and other interstate carriers has been the source of recurrent [constitutional] litigation." *Department of Rev.* v. *ACF Indus., Inc.*, 114 S. Ct. 843, 845 (1994). It is no mystery why this is so. Taxes imposed upon interstate carriers are borne primarily by individuals—*e.g.*, shareholders and consumers—beyond the

borders of the assessing state. Thus, by increasing the tax burden on interstate carriers, the assessing state may decrease the tax burden on its own residents.

This Court has repeatedly held that the Constitution places strict limits on a state's power to export its tax burden in this fashion. Thus, although "[a] state may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable," *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336, 344 (1989), it may *not* discriminate against outsiders by creating arbitrary classes of property that bear no rational relationship to any legitimate state purpose. See, *e.g., Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 882 (1985). Nor will the Equal Protection Clause of the Fourteenth Amendment abide discriminatory *enforcement* of a facially neutral classification scheme. See *Allegheny Pittsburgh*, 488 U.S. at 345; *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 445 (1923) ("it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property") (internal quotations omitted).

As the decision below demonstrates, however, this Court's constitutionally-mandated intolerance of unreasonably discriminatory tax schemes has not quelled the desire of states to impose them. This case presents a challenge to the latest (and most creative) state effort in that regard. The state of Kansas concedes that it discriminates in the enforcement of its property tax laws *within* the state-recognized class of public utility property by offering favored public utilities side deals that substantially reduce their effective tax rates. That, of course, is exactly the type of unreasonable preferential treatment that this Court condemned as violative of the Equal Protection Clause in *Allegheny Pittsburgh*. In the decision

below, however, the highest Court of the State of Kansas ruled that in passing the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 ("4-R Act"), a federal statute that *prohibits* discriminatory taxation of interstate rail carriers, Congress unwittingly *authorized* discriminatory taxation against other interstate carriers. See Pet. App. 16a-19a.

The Kansas court's creation of this broad new exception to the rule of *Allegheny Pittsburgh* and its predecessors directly conflicts with an earlier decision of the highest court of the State of Nebraska. See *Northern Natural Gas Co.* v. *State Bd. of Equalization & Assessment*, 443 N.W.2d 249 (Neb. 1989). Moreover, challenges to similar discriminatory tax schemes that target certain interstate carriers are currently pending in a number of other jurisdictions. See, *infra* p. 8. This swelling jurisdictional split over the effect of a *federal* statute on the *federal* constitutional guarantee of equal protection (and state tax uniformity laws) has an immediate and irreparable impact on the targeted interstate carriers and on the competitive structure of the markets served by those carriers. In the energy industry, for example, the tax burdens of interstate carriers—and hence the rates of energy consumers nationwide—now turn on which of two conflicting interpretations of the 4-R Act happens to prevail in various assessing jurisdictions.

Amicus curiae respectfully submits that this Court should grant the petition in order to resolve the existing conflict, harmonize the commands of the federal 4-R Act and the Equal Protection Clause of the Constitution, and safeguard both established principles of federalism and Equal Protection limits on discriminatory taxation.

REASONS FOR GRANTING THE PETITION

Public utility property, including the property of most interstate carriers, is taxed at a higher rate than other commercial and industrial property in the state of Kansas. The Kansas Constitution, which guarantees "a uniform and equal rate of assessment and taxation," Kan. Const. art. 11, § 1(a), does provide, however, that all property *within* the public utility class shall be assessed "uniformly" at 30% of its value. *Id.* § 1(b). See also Pet. App. 19a ("Art. 11, § 1 [of the Kansas constitution] treats all public utility property alike"). Thus, the Kansas constitution mirrors the federal Equal Protection Clause prohibition against discriminatory assessments within a class. See, *e.g.*, *Allegheny Pittsburgh, supra.* Kansas includes both interstate railroads and interstate pipelines within the public utility class. See Kan. Stat. Ann. § 79-5a01(a) (1989). Notwithstanding the dual state and federal command of uniform taxation within a class, however, Kansas does *not* assess railroad and pipeline property uniformly.

During the relevant period, petitioners' pipeline property was assessed at the full 30 percent rate set out in the Kansas constitution. Railroad property, by contrast, was assessed at effective rates as low as *6 percent.*[1] Kansas claims that it granted this preference to railroads in settlement of the railroads' 4-R Act challenges to Kansas' practice of assessing railroad property (like all other public utility property) at higher rates than other commercial and industrial property. Whatever Kansas' *ad hoc* rationale for discriminating in favor of railroads within the broader class of public utilities, however, it is clear that

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[1] During the relevant period, railroad real property was assessed at rates as low as 22.3 percent of value. *See, e.g., Burlington N. R.R.* v. *Beshears*, 1991 Consent Decree, ¶¶ 19-20. Further, a full 80 percent of railroad personal property was exempted from property taxes altogether, resulting in an effective assessment rate of only 6 percent of value. *See, e.g., Burlington N. R.R.* v. *Rolfs*, 1989 Consent Decree, ¶¶ 14-15, 17.

the state's property tax scheme involves precisely the sort of "intentional systematic undervaluation by state officials of . . . taxable property in the same class" that this Court condemned in *Allegheny Pittsburgh*. See 488 U.S. at 345. See also *Hillsborough County* v. *Cromwell*, 326 U.S. 620, 623 (1946) ("the equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class").

In a strained effort to save Kansas' impermissibly discriminatory tax scheme, the court below ruled that the 4-R Act, which prohibits states from assessing *railroad* property at "a higher ratio to the true market value" than other commercial and industrial property, 49 U.S.C. § 11503(b)(1), somehow also prevents application of both the state *and* federal constitutional guarantees of equal protection to *non*railroad property. The court reached that conclusion notwithstanding its own concession that "there is absolutely no indication in the record that Congress intended, by the enactment of [the] 4-R [Act], to preempt or affect how pipeline property was assessed or taxed by the states." Pet. App. 15a.

The decision below directly conflicts with a prior decision of the Nebraska Supreme Court. In *Northern Natural, supra*, the Nebraska court properly recognized that although the 4-R Act may explain *why* a state treats railroads differently than other property owners in the same class, it does not *justify* the different[illegible]l. See 443 N.W.2d at 256 ("it makes no difference if the undervaluation of the property of the railroad and car companies comes about because of deliberate action by the Board, legislative enactment, or the final and binding judgment of the federal courts. The conclusion remains the same: the equal protection clause of the 14th amendment mandates that the same result be reached with respect to the personal property of [the pipeline company] as that in the case of the railroad and car companies"). Thus, both the state uniformity requirement and the Fourteenth Amend-

ment to the Constitution "remain viable." See *id.* at pp. 255-56, 260. Having concluded that the real and personal property of railroads and pipelines belong in the same public utility class for taxation purposes, Kansas' executive officers may not, consistent with the constitutional requirements of equal protection and uniformity, tax them differently.[2]

This case thus squarely presents a conflict on a recurring and important question of federal law—the federal 4-R Act currently means one thing in Nebraska and quite another in Kansas (as well as Alabama and Tennessee).[3] More importantly, because the Kansas court used its novel interpretation of the 4-R Act as a springboard to modify both state and federal requirements of equal protection, the split among the lower courts has constitutional significance on a number of levels.

First, as this Court made clear in *ACF*—which was decided *after* the Kansas decision under review[4]—the

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[2] This is not to say that states *necessarily* must confine property taxation of *non*-rail interstate carriers within the limits the 4-R Act imposes with respect to rail carriers. As noted, *supra* p. 6, states are free to assign different kinds of property to different classes that bear different tax burdens so long as the classifications are reasonable and bear some rational relationship to legitimate state purposes. In fact, Congress expressly gave the states a three-year grace period within which to adjust their taxation schemes consistent with the 4-R Act. *See* Pub. L. No. 95-473, § 2(b), 92 Stat. 1337, 1466 (1978). However, Kansas elected *not* to so modify its laws. Indeed, even when it modified its constitution in 1985, Kansas continued to classify railroads and pipelines together and to require them to be taxed uniformly. Thus, the Kansas legislature has concluded that, even in the wake of the 4-R Act, railroads and pipelines are similarly situated. Both the state and federal constitutions therefore require that they be taxed uniformly.

[3] *See State* v. *Colonial Pipeline Co.*, 471 So. 2d 408 (Ala. Civ. App. 1984); *Federal Express Corp.* v. *Tennessee State Bd.*, 717 S.W.2d 873 (Tenn. 1986) (4-R Act preempts state-law guarantee of "equal and uniform" tax treatment).

[4] Because *ACF* issued after the decision below, *amicus curiae* respectfully submit that, at a minimum, a remand to the Kansas

question whether the federal 4-R Act preempts *state* uniformity requirements implicates fundamental issues of federalism. In *ACF* this Court rejected a railroad challenge to a state exemption of certain *non*railroad property, because the 4-R Act does not speak to nonrailroad exemptions, and "[h]ad Congress, as a condition of permitting the taxation of railroad property, intended to restrict state power to exempt nonrailroad property, we are confident that it would have spoken with clarity and precision." 114 S. Ct. at 850. As the court below conceded, the 4-R Act also has nothing to say about how a state classifies taxpayers or whether it provides a guarantee of uniformity within a particular class. Thus, "interpreting" the 4-R Act to preempt such requirements, as the court below did, raises serious federalism concerns that should be resolved by this Court. See *id.* ("when determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope").

Second, even if the 4-R Act could somehow be read as preempting *state* constitutional uniformity requirements, the Kansas court's conclusion that the 4-R Act also eliminates the Fourteenth Amendment prohibition against discrimination within a class is nothing less than startling. Plainly, the Constitution's command that a state not discriminate among the members of a class *that the state has itself defined* and the 4-R Act's requirement that a state not discriminate against railroads can easily coexist. And even if they could not, it is the Fourteenth Amendment and not the 4-R Act that must prevail. See U.S. Const. art. VI.

Plainly, the proper scope of the 4-R Act and its impact (if any) on state tax uniformity requirements and the federal constitutional equal protection guarantee are uniquely federal questions that demand coherent federal

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court for reconsideration of its decision in light of *ACF* would be appropriate.

answers. Years of time-consuming and expensive litigation have failed to produce a clear answer from the lower courts, and the time has come for this Court definitively to harmonize the 4-R Act and state and federal constitutional guarantees of equal protection.

That this issue is recurring and important cannot be doubted—this type of abuse is by no means confined to the natural gas industry or to the state of Kansas. To the contrary, interstate carriers of all types—from MCI Telecommunications Corp. to petitioner Mapco Ammonia Pipeline, Inc.—have challenged the discriminatory Kansas property tax scheme. And litigation challenging similar discriminatory property tax systems is currently pending in a number of other states. See, *e.g.*, *ANR Pipeline Co.* v. *Wisconsin Dep't of Rev.*, No. 93-CV-4343 (Wis. Cir. Ct. filed May 9, 1994); *In re ANR Pipeline Co.*, No. 727 (Iowa St. Bd. Tax Rev. filed Jan. 21, 1994). Indeed, more than a dozen other states currently discriminate against certain interstate carriers.[5] Thus, until resolved this conflict over the proper scope of the federal 4-R Act promises to have a substantial negative impact on interstate commerce.

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[5] *Amicus curiae* understand that the following states, although classifying both rail and non-rail carriers as public utilities, tax non-rail interstate carriers at higher rates than rail carriers: Alabama (rail carriers 20%, non-rail carriers 30%), Iowa (personal property of rail carriers, but not non-rail carriers, exempt from taxation), Louisiana (rail carriers 15%, non-rail carriers 25%), Michigan (rail carriers 50% of 40%, non-rail carriers 50% of 75%), Minnesota (personal property of rail carriers, but not non-rail carriers, exempt from taxation), Mississippi (rail carriers 15%, non-rail carriers 30%), North Dakota (personal property of rail carriers, but not non-rail carriers, exempt from taxation), Ohio (rail carriers 25%, non-rail carriers 88%), Oklahoma (rail carriers 11.9%, non-rail carriers 24%), South Dakota (personal property of rail carriers but not non-rail carriers, exempt from taxation), Tennessee (rail carriers 40%, non-rail carriers 55%), West Virginia (rail carriers 50%, non-rail carriers 56.165%), Wisconsin (personal property of rail carriers, but not non-rail carriers, exempt from taxation).

In summary, this case preesnts important questions of federal law which have not been, but should be, settled by this Court. The Court should grant the petition to resolve the conflict in the lower courts regarding the proper harmonization of the federal 4-R Act with the federal constitutional guarantee of equal protection.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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APPENDIX

The full membership of the Interstate Natural Gas Association of America is:

Alabama-Tennessee Natural Gas Company
Alberta Natural Gas Company, Ltd.
American Oil and Gas Corporation
British Gas plc
The Coastal Corporation
The Columbia Gas System, Inc.
Consolidated Natural Gas Company
Delhi Gas Pipeline Corporation
El Paso Natural Gas Company
Enron Corp.
Equitrans, Inc.
Foothills Pipe Lines Ltd.
Gaz de France
Granite State Gas Transmission, Inc.
Great Lakes Gas Transmission Company
KN Energy, Inc.
Koch Hydrocarbon Company
Leviathan Gas Pipeline Company
Lone Star Gas Company
Michigan Gas Storage Company
Mid Louisiana Gas Company
MidCon Corp.
National Fuel Gas Supply Corporation
NorAm Energy Corp.
Northern Border Pipeline Company
NOVA Corporation of Alberta
Pacific Gas Transmission Company
Pacific Interstate Company
Panhandle Eastern Corporation
Pemex-Gas y Petroquimica Basica
Questar Pipeline Company
Sabine Pipe Line Company
Sonat Inc.

Tenneco Gas
TransCanada PipeLines
Transco Energy Company
Valero Interstate Transmission Company
Westcoast Energy Inc.
Williams Natural Gas Company
Williston Basin Interstate Pipeline Company

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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DEPARTMENT OF REVENUE OF THE STATE OF KANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Committee on State Taxation ("COST") hereby respectfully requests leave to file a Brief as *Amicus Curiae* in Support of Petitioners. The interest of COST as *amicus curiae* is described *infra* at Brief, p. 1. Despite COST's qualifications to submit an *amicus* brief, Counsel for Respondent has refused to consent to the filing of such a brief. However, in the absence of such permission there are at least two reasons for granting this motion.

First, with respect to the Petition filed in this case, COST has additional observations to make concerning

the Equal Protection implications of the property tax exemption scheme being challenged herein. A full exposition of the controversy and the potential ramifications of this case by each interested and eligible *amicus* is ultimately to the benefit of the Court in its administration of certiorari writs.

Second, MAPCO, Inc., parent corporation of two of the Petitioners, is but one of many member companies of COST that are concerned with the ability of state courts to interpret and administer tax laws in a manner designed to alleviate States' fiscal responsibility for unconstitutional taxing schemes. The recourse to the 4-R Act described herein is but one manifestation of state court practices in this regard; COST has monitored these practices for several years and is uniquely qualified to comment on the scheme in question.

Respectfully submitted,

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Dated: July 13, 1994

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BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation as *amicus curiae* in support of Petitioner in the above-captained matter. Written consent of the Petitioner has been obtained and filed with the Clerk of the Court; the Motion for Leave to File a Brief *Amicus Curiae* is made because the Respondent has refused to likewise grant permission to file a brief.

INTEREST OF *AMICUS CURIAE*

The Committee on State Taxation ("COST") is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST, which was separately incorporated on January 1, 1992, has a membership of over 420 major multistate corporations, engaged in interstate and international business. COST's objective is to pre-

serve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. Taxing schemes and tax accommodations of specific taxpayers that effect a discrimination against other taxpayers in the same class, such as occurred in this instance, constitute the exact offenses that COST opposes. Therefore, COST has an interest in this case.

SUMMARY OF ARGUMENT

Kansas is subject to certain restrictions on its otherwise sovereign taxing authority, by virtue of preemptive federal mandates. The federal "4-R" Act requires that the State's property taxation scheme not discriminate against railroads, compared to other "commercial and industrial" property in the State, by reference to either tax rates or assessment ratios. However, the 4-R Act's preemptive scope does not extend to state law property classifications for exemption purposes. Therefore, contrary to the conclusion of the Kansas Supreme Court, the 4-R Act did *not* dictate the result from which Petitioners demur; namely, that the State accord 80% exemptions from taxation of railroad personal property, but tax 100% of the personal property of all other members of the "public utilities" taxation subclass.

The violation of Equal Protection under the Fourteenth Amendment in this case is aggravated by the fact that this Court issued its decision in *Department of Revenue v. ACF Industries, Inc.*, 114 S. Ct. 843 (1994), which established the above-noted limitations on 4-R Act preemption of State law, three days after the Kansas Court's decision in this case—but the Kansas Court chose to ignore the dictates of this Court by denying the Petitioners' Motion for Rehearing in light of *ACF Industries*. The enforcement of this Court's pronouncements of law should not be left to the whims of state courts. Those pronouncements should serve as iron-clad principles guiding both state courts' considerations and reconsiderations of constitutional questions such as those presented in this case.

ARGUMENT

Kansas law places railroads and other "public utilities," including pipelines, in the same subclass for property tax purposes. Kansas Const., art. 11, § 1(b); K.S.A. 79-5a01. Among their allegations, ANR and the other Petitioners claim that they have suffered discriminatory tax treatment in violation of the Equal Protection Clause by virtue of the fact that certain railroads received nonstatutory 80% exemptions of personal property from property taxation. In contrast, 100% of the property of the Petitioners was subject to property taxation.

The Kansas Supreme Court recognized that the exemptions accorded to certain railroads by the Director of Property Valuation fell outside the bounds of the Kansas property tax statutes and interpretive regulations, and recognized that this was the result of the settlement of claims the favored railroads made under the federal "4-R" Act. *See* Pet. Br. App. 8a; *see also* Railroad Revitalization & Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 54-5 [codified at 49 U.S.C. § 11503 (1988)]. Moreover, the State Court acknowledged that it was "at a loss from the record to see the basis for this exemption," Pet. Br. App. 8a. Nevertheless, it concluded that the equal treatment of certain railroads and of the Petitioner pipelines was not violative of the Equal Protection Clause of the Constitution. It did so because it found that the 4-R Act preempted state law property classifications:

> The 4-R Act, as it applies to Kansas and as reflected in the consent decree, simply required that railroad property be assessed at no higher rate than commercial or industrial property. Railroad property was thereby made an exception to subclasses to which public utility property was assigned.

Pet. Br. App. 12a.

Some of the preferential treatment of railroad property is dictated by the federal government under the 4-R Act. To the extent that a State has applied either an assessment ratio or tax rate to railroad property that is discriminatory, relative to the ratios or rates applied to any other commercial or industrial property located in the State—by reference to the most favorable treatment accorded to commercial or industrial property, whether or not that property is classified or subclassified with railroad property for state tax purposes—such discriminatory treatment is preempted by the 4-R Act. However, the State Court's conclusion that the 4-R Act completely preempts state law and mandates an exemption of 80% of railroad property from any taxation at all is clearly repudiated by this Court's decision in *Department of Revenue v. ACF Industries, Inc.*, 114 S. Ct. 843 (1994).

This Court stated in *ACF Industries* that the 4-R Act is structured and drafted to address the manner in which "property subject to a tax levy" is taxed, and that the Act therefore "does not limit state discretion to levy a tax upon railroad property while exempting various classes of nonrailroad property." *ACF Industries*, 114 S. Ct. at 850. In other words, while Congress "prohibited discriminatory tax rates and assessment ratios in no uncertain terms . . . and sets forth precise standards for judicial scrutiny of challenged rate and assessment practices," *ibid.*, the Act does not make railroad property an exception to any state law classification for exemption purposes. Furthermore,

> Principles of federalism support, in fact compel, our view. Subsection (b)(4), like the whole of § 11503, sets limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty. . . . When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evi-

> dent scope. . . . We will interpret a statute to pre-empt the traditional state powers only if that result is "the clear and manifest purpose of Congress." . . . As explained above, neither subsection (b)(4) nor the whole of § 11503 meet this standard with regard to the prohibition of property tax exemptions.

Id. at 850-851 (citations omitted).

The Kansas Supreme Court's decision in this case was issued on January 21, 1994; *ACF Industries* was issued on January 24, 1994. Petitioners immediately moved the Kansas Supreme Court for a rehearing of its case in light of this Court's enunciation of the principles of federal preemption of state property taxation of railroads. Nevertheless, in complete disregard of this Court's ultimate authority to speak to the issue of preemption, the State Court denied, without comment, the Petitioners' Motion for Rehearing on March 15, 1994.

The Petitioners deserve to have their claims reviewed under the proper constitutional standard—the Equal Protection Clause of the Fourteenth Amendment—and by reference to the appropriate line of authority. *See, e.g., Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989). The guaranty of equal protection "protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946). The above-cited cases enunciate the test for whether a violation of the Equal Protection Clause has occurred, *i.e.*, whether an "intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property." *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352-353 (1918); *Sioux City, supra* at 445-446.

The Petitioners in this case were accorded the tax treatment provided for by Kansas law; however, other members of their class were unfairly accorded better treatment. The Kansas Director's intentional and systematic exemption of large portions of property of one specific subset of taxpayers (the railroads in question) constitutes an undervaluation of select property in the public utility subclass to the constitutional detriment of all other members of that subclass whose property is not exempt. In this regard, it is inadequate to relegate the Petitioners here to a remedy of seeking equal inclusion in the tax base and taxation of railroad property; as this Court clearly recognized in *Allegheny Pittsburgh,* a remedy is unavailable to the petitioners in such cases as a practical matter absent court action:

> "The [Equal Protection Clause] is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class."

488 U.S. at 346 (quoting *Hillsborough,* 326 U.S. at 623).

If this Court does not grant a writ of certiorari in this case, then the case should at the very least be remanded for reconsideration in light of *ACF Industries,* and—if the Kansas Supreme Court does not reverse itself—for a statement of the basis upon which discrimination is justified.

CONCLUSION

For the reasons set forth above, the Committee On Taxation respectfully requests that the Court grant a writ of certiorari in this case, or, in the alternative, remand the case for a statement of the basis upon which discrimination is justified.

Respectfully submitted,

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No. 93-1995

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ANR PIPELINE COMPANY, *et al.*,
Petitioners,

v.

DIRECTOR OF PROPERTY VALUATION,
DEPARTMENT OF REVENUE OF THE STATE OF KANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

In the petition for a writ of certiorari, petitioners demonstrated that the Kansas property taxation practice of intentionally and systematically treating certain railroads more favorably than the other members of the same state law property subclass (1) violates the Equal Protection Clause of the Fourteenth Amendment, (2) conflicts with decisions of the Nebraska Supreme Court and this Court, and (3) is inconsistent with the most elementary principles of preemption. Respondent's brief in opposition —which openly concedes that Kansas intentionally discriminates between members of the same state-defined property class—merely reinforces the clear need for this Court's review of the decision below.

1. Respondent manifestly mischaracterizes the relief sought by petitioners. Petitioners make no claim that they come within the scope of the 4-R Act. Opp. 5. Instead, petitioners seek to be treated in a uniform and equal manner as provided for by the Kansas Constitution. The Kansas Constitution requires uniform assessment among members of the same subclass and also requires a uniform and equal basis of valuation for all property subject to taxation. Pet. App. 36a-37a. The administrative choice to treat certain railroads differently from pipelines, which violates state law, is prohibited by the Equal Protection Clause of the Fourteenth Amendment. Accordingly, this Court, and not Congress, is the appropriate forum for petitioners' request that the violations of their constitutional rights be redressed.

2. Respondent concedes that "pipelines are state assessed public utilities, as are railroads," and that "Kansas has classified property for property tax purposes, placing pipelines and railroads in the public utility subclass." *Id.* at 2. In addition, respondent recognizes that the Kansas constitution "requires uniform and equal tax treatment within constitutionally prescribed subclasses." *Id.* at 8; See also Pet. App. 19a (the Kansas Constitution "treats all public utility property alike"). Thus, Kansas' unambiguous legislative policy of mandating uniform treatment of railroads and pipelines could not be clearer and is uncontested by respondent, and these concessions are fatal to respondent's arguments. Having determined that railroads and pipelines are similarly situated for purposes of property taxation, Kansas is bound by the federal equal protection requirement to tax them uniformly.

Respondent does not even try to construct a rational basis for its discrimination, relying instead on the supposed compulsion of the 4-R Act. See Opp. 10 n.11; but see *infra* p. 5. But it was *Kansas*, and not the 4-R Act, that determined that railroads and pipelines are similarly situated. The 4-R Act only requires that states not

assess or tax railroad property at rates higher than those applied to commercial and industrial property. See Pet. App. 34a-35a.

Respondent also ignores that the special treatment afforded by state taxing officials to certain public utilities was not even extended to all *railroads*. See Pet. 5. Thus, respondent not only violated the equal protection rights of petitioners, but also the rights of numerous railroads. See *id.* at 10-11.[1]

Respondent's argument that the pipelines were assessed at the percentage of value provided by state law completely misses the point. See Opp. 2-3. Petitioners' complaint is the same as the taxpayer in *Allegheny Pittsburgh*. And there, this Court made it perfectly clear that the " 'intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.' " *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336, 345 (1989) (quoting *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350, 352-53 (1918)). Therefore, the Equal Protection Clause is violated when the state subjects a taxpayer to taxes " 'not imposed on others of the same class' " through the deliberate actions of state taxing officials in contravention of the state's declared public policy. *Id.* (quoting *Hillsborough* v. *Crombell*, 326 U.S. 620, 623 (1946)); *Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2334-35 (1992).[2]

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[1] Nor was this favorable treatment "ordered" by the Kansas district court as respondent rationalizes. Opp. 3. Favorable tax treatment was voluntarily given to those railroads that brought suit against respondent. *Id.* at 2.

[2] The fact that *Allegheny* and the other decisions of this Court establishing the principles by which state taxation schemes are governed under the Equal Protection Clause do not specifically address the 4-R Act hardly makes those decisions inapplicable to the present case. *See* Opp. 11. Without the 4-R Act the proper course would be summary reversal. Because of the 4-R Act, the

3. Respondent further concedes that the decision of the Nebraska Supreme Court in *Northern Natural Gas Co.* v. *State Board of Equalization & Assessment*, 443 N.W.2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990), directly conflicts with the result reached by the court below. Opp. 7 ("it is true that the Nebraska Supreme Court required pipeline property to be equalized with railroad property"). Nevertheless, respondent argues that the result in the Nebraska decision was justified because, "regardless of the ramifications of the 4-R Act," the state was required to give railroads and pipelines equal treatment. *Id. But the same is true in Kansas.* The Kansas Constitution provides for "a uniform and equal basis of valuation . . . of *all* property." Pet. App. 36a (emphasis added). By granting personal property deductions to certain railroads, Kansas taxing officials have violated the state law command that there be a uniform basis of valuation which applies regardless of property classifications. In addition, as noted above, respondent concedes that the Kansas legislature classified railroads and pipelines together in the same property subclass and made it a matter of state policy to assess railroads and pipelines uniformly. Thus, there simply is no "contrast" (*id.* at 8) between the tax treatment prescribed by state law for railroads and pipelines in Kansas and Nebraska.[3] The decisions directly conflict.

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issue warrants plenary review to resolve the conflict with the Nebraska Supreme Court.

[3] Respondent's allegation that the Utah Supreme Court has rejected an argument similar to petitioners' (Opp. 10) is manifestly unfounded. In *Kennecott Corp.* v. *Utah State Tax Commission*, 858 P.2d 1381, 1388 (Utah 1993), the court unremarkably found that the mining business seeking uniform treatment with the railroads was not in the same property class and was not "similarly situated" to railroads. The "sole basis" for the mining company's claim was that both sets of taxpayers were centrally assessed. *Id.* The court agreed there was no other similarity between the two taxpayers. *Id.*

4. The 4-R Act simply does not preempt state law property classifications. See Pet. 16-17. There is no inconsistency between the state's obligations under the 4-R Act (nondiscrimination against railroads) and the state constitution (uniform treatment of railroads and pipelines). See Pet. 17. The Court's decisions in *Department of Revenue* v. *ACF Industries, Inc.*, 114 S. Ct. 843, 846 (1994), and *BFP* v. *Resolution Trust Corp.*, 114 S. Ct. 1757 (1994), make it clear that the 4-R Act is not to be given the expansive preemptive scope accorded it by the Kansas Supreme Court and respondent. See Pet. 18-19. Accordingly, it is respondent who seeks through extensive and unwarranted preemption of state law classifications to "further disrupt[]" (Opp. 13) the state's unambiguous tax policy of uniform treatment so that it can excuse the favorable—albeit unlawful—treatment its taxing officials afforded to certain railroads.

5. Finally, respondent does not deny that this case raises issues of immense national importance or that it has profound economic significance for open-access common carriers as well as energy consumers nationwide. Indeed, because of respondent's refusal to consent, several *amici curiae* have moved for leave to file briefs in support of the petition and have noted the wide-spread nature of the tax discrimination at issue in this case. See, *e.g.*, Proposed Brief *Amicus Curiae* of Interstate Natural Gas Ass'n of America, at 8 n.5 (noting additional states engaging in discriminatory tax treatment).

* * * *

Because the decision of the court below upheld the actions of respondent depriving petitioners of equal protection under Kansas law in direct conflict with the decision of the Nebraska Supreme Court and this Court's decisions, certiorari should be granted.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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